UNIVERSITY OF
TORONTO
FACULTY OF LAW

FREEDOM OF EXPRESSION AND THE PRESS IN CANADA

Cases and Materials

(Fifth Edition 2000)

VOLUME THREE

M. David Lepofsky

Jamie Cameron

Christopher Bredt

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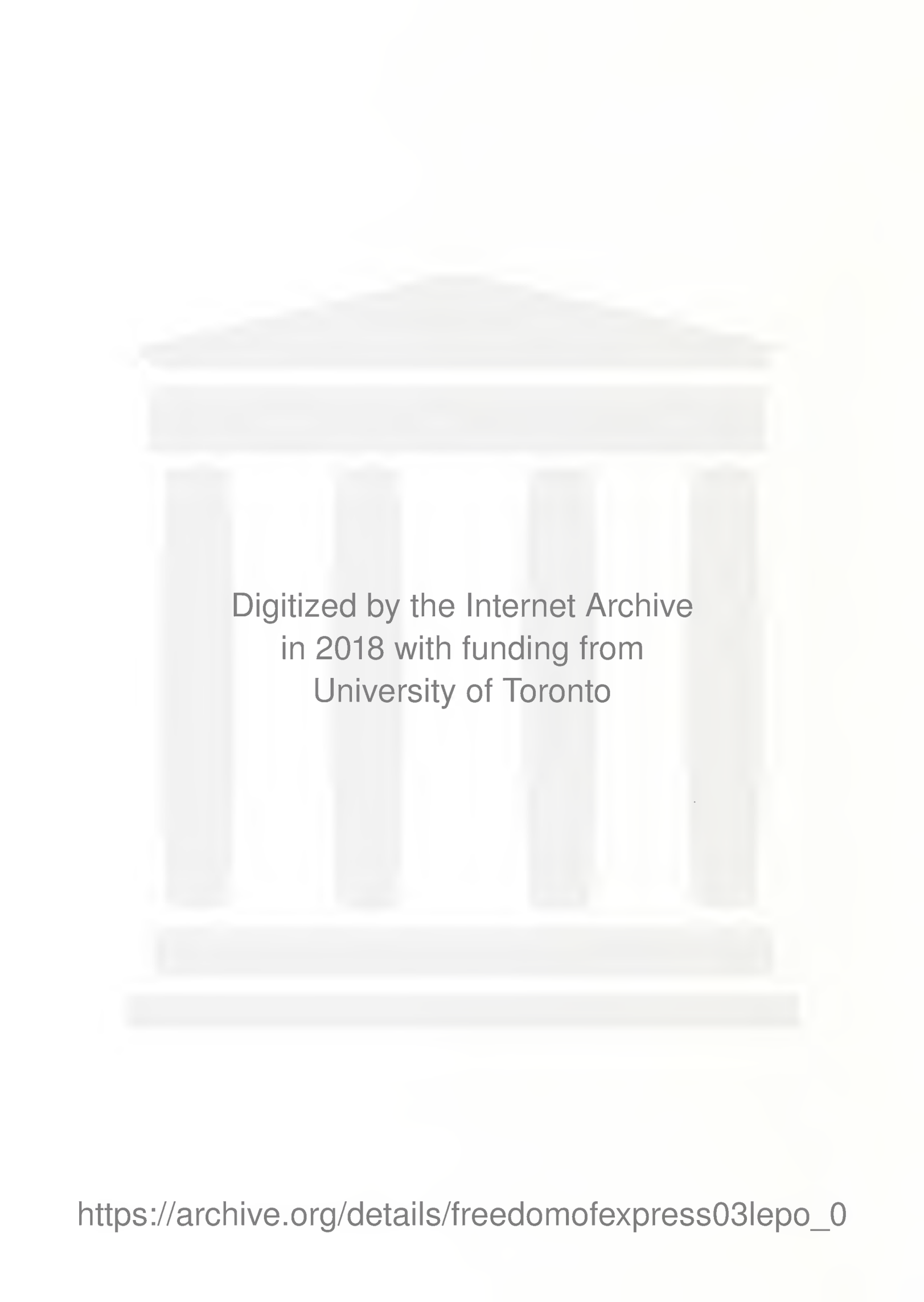

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CHAPTER 14

THE VENUE OF EXPRESSION PART ONE - THE PUBLIC FORUM

1. INTRODUCTION

The specific free expression topics which have been considered in the preceding chapters have dealt primarily with government efforts at regulating the content of expression. Discussion has focused on such questions as whether communications can be suppressed or regulated where they foster hate against identifiable racial or religious groups, or where they mislead the public about the virtues of a product for sale, or where they deprive a person of his or her good name and reputation in the community.

Attention now turns away from the regulation of the content of expression at large, and towards regulation of the venue of expression. The question presented in this chapter and the next is: where can one engage in expressive activity? Does **Charter** s. 2(b) guarantee to members of the public any right to express themselves on the property of others? If so, on whose property? Where? When? This chapter examines the use of public property as a platform for expressing one's self to the public. This raises the question of the so-called "public forum" The next chapter examines the use of the private property of others to reach one's audience. That pertains to the so-called "quasi-public forum".

The U.S. First Amendment jurisprudence has grappled with these issues for some time. It has evolved a "public forum" doctrine, which provides that the First Amendment guarantees some degree of a right of access to certain publicly owned property to engage in expressive activity. As with all First Amendment issues, a test has evolved respecting the identification of what properties constitute public forums, and what kinds of limits on expression are constitutionally permissible in a public forum. This jurisprudence has been complicated by the advent of claims of access to certain quasi-public private properties, such as shopping malls, for expressive purposes.

In Hague v. C.I.O., 307 U.S. 496 (1939), Justice Roberts of the U.S. Supreme Court made a vital contribution to free speech doctrine. By invalidating ordinances prohibiting assemblies in public areas, he introduced the concept of a "public forum". That concept is one of the foundations of the modern U.S. first amendment doctrine. Essentially, Justice Roberts suggested that the first amendment guarantees citizens some right of access to public property for purposes of engaging in expressive activity. These were his specific words:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Such a right of access raises a number of difficult questions. First of all, its scope will depend on whether the courts conclude that a citizen using the street "as a forum and not as a passageway is making an anomalous use of it, and whether he is, in a sense, always out of place and out of order when he chooses the street for his meeting place." H. Kalven, "The Concept of the Public Forum: Cox v. Louisiana, 1965 S.Ct. Law Rev. 1, at 12. Moreover, once a general right of access was recognized, it became necessary for the American courts to determine what restrictions on the use of forum property would be permissible under the first amendment. The time, place and manner doctrine, as refined by recent decisions, determines the reasonableness of restrictions on the use of public property.

Though it may be instinctive to view the streets, parks and sidewalks as a proxy for a public hall, what about other kinds of public property, such as jails, swimming pools, and public schools? Should the same right of access apply to other types of public property which are clearly dedicated to particular uses? A related question is whether any distinction between property such as a street or sidewalk and private property to which the public is granted general access, such as a shopping mall, is valid.

Claims of a constitutional right of access to the property of others, including government property, for expressive purposes are of course inevitable. As of the time of the preparation of these materials, the Supreme Court has taken its first shot at developing made-in-Canada principles for addressing the question of the use of government property as a platform for disseminating one's views. In A.G. Canada v. the Committee for the Commonwealth of Canada [1991] 1 S.C.R. 139, the court invalidated federal restrictions on handing out political leaflets in the public areas of an international airport. The court badly split on the test to employ to address such questions. Future cases will no doubt be required to clarify the doctrinal confusion in this area.

To address these questions, attention first turns in this chapter to claims of access to public property under the U.S. Constitution, and under the **Charter**. Thereafter, attention in the following chapter turns to claims of access to privately-owned property for purposes of engaging in expressive activity. These two chapters together serve as a bridge between the preceding

discussion of the regulation of the content of expression, and the materials which follow and which deal specifically with the rights and duties of mass media establishments under the Charter.

EVOLUTION OF THE U.S. PUBLIC FORUM DOCTRINE

Lovell v. City of Griffin, 303 U.S. 444 (1938)

[Appellant, Alma Lovell, was convicted of the violation of a city ordinance and was sentenced to imprisonment for fifty days in default of the payment of a fine of fifty dollars, for the distribution without the required permission of a pamphlet and magazine in the nature of religious tracts, setting forth the gospel of the "Kingdom of Jehovah." Appellant did not apply for a permit, as she regarded herself as sent "by Jehovah to do His work" and that such an application would have been "an act of disobedience to His commandment." Upon the trial appellant moved to dismiss the case on a number of grounds, including that the ordinance violated the Fourteenth Amendment of the Constitution of the United States in abridging "the freedom of the press" and prohibiting "the free exercise of petitioner's religion."]

Hughes C.J.: ...

The ordinance in its broad sweep prohibits the distribution of "circulars, handbooks, advertising, or literature of any kind." It manifestly applies to pamphlets, magazines and periodicals. The evidence against appellant was that she distributed a certain pamphlet and a magazine called the "Golden Age."

The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation "either by hand or otherwise. " There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the City Manager.

We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish "without a license what formerly could be published only with one." ... While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. ... Legislation of the type of the ordinance in question

would restore the system of license and censorship in its baldest form.

Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.

Notes and Questions

1. Why was this permit requirement invalid? Did Chief Justice Hughes find that the appellant had a right to distribute this literature? In the absence of such a right, and given that the ordinance treated all literature identically, did she have any constitutional claim? In other words, what could be problematic about a permit requirement which is neutral on its face? Does the Chief Justice suggest that permit requirements are per se invalid? If not, what distinguishes those that are permissible from those that are impermissible? Give examples.

2. Lovell v. Griffin is also important as a prior restraint case, and as an example of legislation found void on its face.

3. The court refers to the historical focus of free speech in the U.S., namely as a guarantee against licensing of the press. Does this have relevance in Canada? If not, should it?

4. In Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent 104 S.Ct. 2118, the question arose as to the proper classification of a utility pole. The respondents attached various signs for the municipal candidate they were supporting to utility poles contrary to a provision of the Los Angeles Municipal Code, which prohibited the posting of signs on public property. In finding for the appellants on the constitutional issue, Stevens J., for the court stated,

> Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for the purposes of their communication comparable to that recognized for public streets and parks, and it is clear that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." ...
>
> Lampposts can of course be used as sign posts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. [at 2133-4]

5. The U.S. Supreme Court upheld the trespass convictions of student protestors who demonstrated against the arrest of other protestors on jail grounds. Declaring that "[t]he State, no less than a private owner of property, has power to preserve the property under its control",

Justice Black considered it irrelevant that the demonstration had been peaceful. Four dissenting judges concluded that a jail housing those who are considered unjustly held, is "an obvious center for protest". Because the protest was peaceful, the convictions should have been reversed. Adderley v. Florida,

Cox v. New Hampshire 312 U.S. 569 (1941)

[Appellants were five "Jehovah's Witnesses" who, with sixty-three others, were convicted in the municipal court of Manchester, New Hampshire, for violation of a state statute prohibiting a "parade or procession" upon a public street without a special license. The sixty-eight defendants and twenty other persons met at a hall in the city of Manchester on the evening of Saturday, July 8, 1939, "for the purpose of engaging in an information march." Each group proceeded to a different part of the business district of the city and there lined up in single-file and proceeded to march along the sidewalk. Each of the defendants carried a small staff with a sign reading "Religion is a Snare and a Racket" and on the reverse "Serve God and Christ the King." Some of the marchers carried placards bearing the statement "Fascism or Freedom. Hear Judge Rutherford and face the Facts." The marchers also handed out printed leaflets announcing a meeting to be held at a later time in the hall from which they had started, where a talk on government would be given to the public free of charge. The marchers interfered with the normal sidewalk travel, but no technical breach of the peace occurred. They did not apply for a permit and none was issued. In response to the charges, appellants claimed that the statute was invalid under the Fourteenth Amendment in that it deprived appellants of their rights of freedom of worship, freedom of speech and press, and freedom of assembly, vested unreasonable and unlimited arbitrary and discriminatory powers in the licensing authority and was vague and indefinite.]

Hughes C.J.: ...

The sole charge against appellants was that they were "taking part in a parade or procession" on public streets without a permit as the statute required. They were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise, or for issuing invitations to a public meeting, or for holding a public meeting, or for maintaining or expressing religious beliefs. Their right to do any one of these things apart from engaging in a "parade or procession" upon a public street is not here involved and the question of the validity of a statute addressed to any other sort of conduct than that complained of is not before us. ...

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as

U.S. 88, and Carlson v. California, 310 U.S. 106. The statute, as the state court said, is not aimed at any restrain of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited.

Notes and Questions

1. Though Chief Justice Hughes first spoke about the City's blanket prohibition as a time, place and manner restriction in Lovell v. Griffin, he did not use that expression in a doctrinal sense until Cox v. New Hampshire. The time, place and manner doctrine permits the state to impose restrictions on first amendment activities in the public forum, provided those restrictions are reasonable. In this context, reasonableness suggests two limitations on the state's regulatory authority. First, to be reasonable, these restrictions must be content neutral and must be administered in an even-handed manner. Second, time, place and manner restrictions must be reasonable in that the expressive activity has to be incompatible with or intrusive of the functional use of the public property. This doctrinal standard still governs today, with refinements that are set out in Heffron v. Int'l Society for Krishna Consciousness, infra.

2. Early on in the Charter jurisprudence, the time, place and manner test was adopted and applied by the B.C. courts. See R. v. Reid (1983), 8 C.C.C. (2d) 153 (B.C. Ct. C.); aff'd (1984), *10 C.*C.C. (2d) 573 (B.C.C.A.), where the defendant was a Jehovah's Witness dissenter who was charged with causing a disturbance by shouting while protesting, through a bullhorn, in front of a Witness church prior to a Sunday service. In holding that sections 171 and 172 of the **Criminal Code** did not violate s. 2(b) of the **Charter**, the Court found that the sections were directed towards the maintenance of public peace and not freedom of expression. The sections were narrow enough to confine police discretion within reasonable bounds, and, considering the time, place and manner of the defendant's demonstration, his conduct was unreasonable and incompatible with the normal use of that public place.

3. Do municipal aesthetics constitute an impermissible regulatory purpose? See Schneider v. State, 308 U.S. 147 (1939) where anti-littering ordinances prohibiting the distribution of literature were held unconstitutional. Should the state's interest in controlling "urban blight" always be considered subsidiary to an individual's right to public property for expressive purposes? If the First Amendment claim prevailed against an ordinance directed at littering, does that suggest that other ordinances prohibiting the posting of bills would also be unconstitutional? See City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984) (dealing with the posting of signs on public property), and Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (dealing with billboards on private property).

4. Compare this statutory provision with the city ordinance invalidated in Lovell v. Griffin. Given New Hampshire's prohibition against use of the streets in the absence of a special license, why was this measure upheld when Griffin's measure was not? Where in this case are any limitations on the licensing authority's discretion prescribed?

5. Should municipalities be permitted to prohibit the placement of newspaper vending boxes on city streets? The Quebec Superior Court has said no; see Re Canadian Newspaper Co. Ltd. v. City of Quebec (1987), 36 D.L.R. (4th) 641 (Que. S.C.), and the B.C. Court of Appeal has said yes; see Canadian Newspaper Co. Ltd. v. City of Victoria (1989), 63 D.L.R. (4th) 1 (B.C.C.A.). If yes, is that because the distribution of newspapers is a commercial enterprise? But most newspapers dedicate a large percentage of their space to "news" about politics and social developments. Can the state differentiate between different kinds of publications, permitting "news" papers and non-profit publications to use street boxes, while excluding sales catalogues, real estate publications, and "The Learning Annex"? Is a selective approach problematic? If it is, what is the solution: total prohibition? What kinds of justifications, other than aesthetic, could support the total prohibition of newspaper vending boxes?

6. The noise truck cases illustrate the problems the U.S. Supreme Court has had dealing with restrictions on the use of the street and choice of remedy. In Saia v. New York, 334 U.S. 558 (1948), the Court invalidated an ordinance prohibiting the use of amplification devices without the police chief's permission. Justice Douglas said the following:

> Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. ... Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning? ... The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. ... Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.

But the in Kovacs v. Cooper, 336 U.S. 77 (1949), the Court upheld an ordinance banning "any device known as a sound truck...[which] emits therefrom loud and raucous noises...". Effectively, the Court "read it down", concluding that it applied only to "loud and raucous noises". In dissent, Justice Black stated that there was "not even a shadow of evidence to prove that the noise was either 'loud or raucous' unless the...ordinance [applies] to any noise coming from an amplifier". In his view, the ordinance effectively barred the use of all loud speakers on sound trucks.

7. Compare the following two provisions; do either or both contravene the **Charter**? If so, which is a greater contravention?

(Option 1) No person shall picket, march or parade on Yonge Street in Toronto between the hours of 4 and 6 p.m., Monday to Friday, between Bloor St. and King street, except with a permit from the chief of police.

(Option 2) No person shall picket, parade or march on Yonge street between 4 and 6 p.m. Monday through Friday, between Bloor Street and King Street.

8. Can a time, place or manner restriction on the expressive use of a public forum ever be "content-neutral"? How does one prove the presence or absence of content neutrality?

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981)

[Each year, the Minnesota Agricultural Society operates a State Fair. The Society is authorized to make all "bylaws, ordinances, and rules, not inconsistent with law, which it may deem necessary or proper for the government of the fair grounds. ... " and under this authority, promulgated Rule 6.05 which provides in relevant part that:

> [s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly-licensed location shall be a misdemeanour.

As Rule 6.05 is construed and applied by the Society, "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds." Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth. The Rule applies alike to non-profit, charitable, and commercial enterprises. One day prior to the opening of the 1977 Minnesota State Fair, respondents International Society for Krishna Consciousness, Inc. (ISKCON) filed suit seeking a declaration that Rule 6.05, both on its face and as applied, violated respondents' rights under the First Amendment. Specifically, ISKCON asserted that the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion.]

White J.:

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned location within the fairgrounds even though application of the rule limits the religious practices of the organization. ...

Notes and Questions

1. Note the new doctrinal formulation: time, place and manner restrictions will be considered reasonable if they are content neutral, satisfy a significant government interest, and leave open alternative avenues of communication. This test applies in cases of a "limited public forum". The expression refers to public property which cannot be classified as a traditional forum like streets and sidewalks, but which also has first amendment implications. When the state creates a limited forum by granting a restricted form of access, the above test applied. As the divergence of opinion in Heffron demonstrates, this standard can permit a broad regulatory scope or otherwise obligate the state to grant the same access that is required in a traditional forum.

2. How should schools be treated? Do students have first amendment rights and if they do, what kind of restrictions are permissible? What about teachers? Can the school exclude material unrelated to school work from teacher mail boxes, or deny teacher groups access to the interschool mail system and teacher mail boxes? See Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). In Perry, the Court summarized the law of public forum as follows:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO. In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Carey v. Brown. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. ...
>
> A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. ... Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place an manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." United States Postal Service v. Council of Greenburgh Civic Assns., supra. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. ... As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Id., 453 U.S., at 129-130... .

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum. ... On this point the parties agree. ... The internal mail system...is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a "limited public forum" from which it may not be excluded because of the periodic use of the system by private non-school-connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. ... [T]here is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no [evidence that] this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. ...

Moreover, even if we assume that by granting access to [some groups], the school district has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which id concerned with the terms and conditions of teacher employment. [at 45-8].

Should the Court have denied a rival teacher group access because the public at large had

not been granted access to these mailboxes, especially general public access, when the group seeking access was unquestionably addressing issues important to the constituents of a particular community? or should the state be allowed to exercise its prerogative to limit access to and by teachers? If not, is academic freedom absolute? if not, when should it be limited?

3. After experimenting with the idea of a "limited public forum", one which is not traditionally a public forum, but which the government may itself choose to open up for First Amendment activity, the U.S. Supreme Court appears to have retreated quickly from it. See Cornelius v. N.A.A.C.P. Legal Defence and Education Fund, 105 S.Ct. 3439 (1985), where the court held, in response to an N.A.A.C.P. request for access to the Combined Federal [charity] Campaign (C.F.C.), that, despite the fact that charitable solicitation is protected speech,

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. [at 3447],

and, at 3450-1,

> Petitioner contends, and we agree, that neither its practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations. ... The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local campaign officials. ... The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes. ... It follows that the Government has the right to exercise control over access to the federal workplace in order to avoid interruptions to the performance of the duties of its employees. ... In light of the Government policy in creating the CFC and its practice in limiting access, we conclude that the CFC is a nonpublic forum.
>
> Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.

4. In Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent 104 S.Ct. 2118, the question arose as to the proper classification of a utility pole. The respondents attached various signs for the municipal candidate they were supporting to utility poles contrary to a provision of the Los Angeles Municipal Code, which prohibited the posting of signs on public property. In finding for the appellants on the constitutional issue, Stevens J., for the court

stated,

> Appellees' reliance on the public forum doctrine is misplaced. They fail to demonstrate the existence of a traditional right of access respecting such items as utility poles for the purposes of their communication comparable to that recognized for public streets and parks, and it is clear that "the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government." ...
>
> Lampposts can of course be used as sign posts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted. [at 2133-4]

5. The U.S. Supreme Court upheld the trespass convictions of student protestors who demonstrated against the arrest of other protestors on jail grounds. Declaring that "[t]he State, no less than a private owner of property, has power to preserve the property under its control", Justice Black considered it irrelevant that the demonstration had been peaceful. Four dissenting judges concluded that a jail housing those who are considered unjustly held, is "an obvious center for protest". Because the protest was peaceful, the convictions should have been reversed. Adderley v. Florida, 385 U.S. 39 (1966).

6. In Greer v. Spock, 424 U.S. 828 (1976), the Court held that regulations barring political activities on a military base were constitutional because the business of Fort Dix was "to train soldiers, not to provide a public forum". Justice Brennan's dissenting opinion advocated an ad hoc test of incompatibility.

7. U.S. Postal Service v. Greenburgh Ass'ns, 453 U.S. 114 (1981) shows how potentially unlimited the concept of forum can be. There, civic associations challenged a federal law prohibiting the placement of unstamped "mailable matter" in home letter boxes. These associations invoked a forum claim in an attempt to use mail boxes without paying for the stamps. Justice Rehnquist held that because a mail box did not constitute a traditional forum, the regulation was valid because it was content neutral and reasonable. Whether or not it satisfied the time, place and manner doctrine was irrelevant.

In dissent, Justice Marshall held that the regulation was inconsistent with "the underlying commitment to communication". He concluded that the state had not sufficiently established it would lose substantial revenues or demonstrated that the regulation was essential to prevent mail fraud.

8. Scholars have criticized the U.S. public forum doctrine on several fronts. The Supreme Court's shifting articulation of doctrine is confused and confusing. Its concepts of content-neutrality and reasonable time, place and manner restrictions are capable of disguising what the court really is doing when it decides on a First Amendment claim. See e.g. Post, "Between

Governance and Management: The History and Theory of the Public Forum" 34 U.C.L.A. L. Rev. 1713, at 1758-9; Dienes, "The Trashing of the Public Forum: Problems in First Amendment Analysis" 55 George Washington L. Rev. 109; Lee, "Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulation of Expression" 54 George Washington L. Rev. 757, and Moon, "Access to Public and Private Property Under Freedom of Expression" 20 Ottawa L. Rev. 339.

2. THE CANADIAN APPROACH

INTRODUCTION

In January, 1991, the Supreme Court gave its first extensive decision on the question of whether and to what extent the public has a constitutional right to to use publicly-owned property as a platform or soapbox for disseminating their message to the public. This case had been foreseen as the court's opportunity to lay down coherent principles which could be followed by lower courts, and which governments could attempt to obey in the management of their property.

The resulting decision, set forth below, involved a 7-judge panel agreeing unanimously that there had been a breach of Charter s. 2(b) on the facts, and that this infringement could not be saved by Charter s. 1. However, of the 7 judges, 6 delivered separate opinions. This yields a simple question with a complex answer. For what legal principle does this decision stand?

To assist in the reading of this case, the text of the factum of the Attorney General for Ontario, an intervenor in the case, is set out before the decision. Examine the factum, and ascertain the extent to which the court's members accepted or rejected the position advanced by Ontario in this case.

A.G. CANADA v. COMMITTEE FOR THE COMMONWEALTH OF CANADA ET AL.

FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO, INTERVENOR

PART III - ARGUMENT

I. General

3. The Attorney General for Ontario intervenes in this appeal because of its implications for

dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated. I see no reason why this should not include areas of airports frequented by travellers and by members of the public. The blanket prohibition against the use of such areas for the purpose of the expression of views thus violated the freedom of expression guaranteed by s. 2(b) of the Charter, a prohibition which my colleagues have been at pains to demonstrate is not justifiable in a free and democratic society.

This is sufficient to dispose of this appeal, and future cases are best left to be dealt with on a case by case basis, until there has been sufficient experience for the development of more specific guidance. It is right to say, however, that in dealing with future cases, I would tend to approach them in the manner suggested by McLachlin J. ...

Gonthier J.:--

While I agree with the several elements put forward by the Chief Justice and L'Heureux-Dubé J. as pertinent to a determination of the extent of freedom of expression on government property according to ss. 1 and 2(b) of the Canadian Charter of Rights and Freedoms, I would structure their application as outlined by McLachlin J. with whose reasons I concur. I also adopt the reasons of L'Heureux-Dubé J. as to the interpretation of s. 7 of the Government Airport Concession Operations Regulations, and its application to the conduct of the respondents. ...

Cory J.:--

I am in agreement with the reasons of Lamer C.J. in so far as they deal with the use of government-owned property by members of the public for the purposes of expressing themselves on various issues, including his suggested method of balancing the use ordinarily made of the particular government premises against the interests of an individual desirous of expressing in public an opinion on some matter.

However, I am in agreement with the conclusion reached by L'Heureux-Dubé J. and her findings that the impugned Regulation contravened s. 2(b) and could not be saved by the provisions of s. 1 of the Canadian Charter of Rights and Freedoms.

Notes and Questions

1. For what legal proposition does this case stand? What propositions, if any, command the support of a majority of the seven justices presiding on this appeal? How should lower courts deal with comparable issues in light of this decision?

2. To what extent if any did the position of the A.G. for Ontario influence the outcome? Did any justice adopt the compendious position which he advanced?

3. To what extent do the various justices hold that government-owned property should be subject to some degree of categorization or classification for s. 2(b) purposes? In the end, does McLachlin, J. oppose venue-based analysis, or does she employ such an analysis?

4. Various justices suggest that they are using the Irwin Toy approach to s. 2(b) here. Are they? Can each opinion support itself by reliance on Irwin? Did the Irwin Toy decision address itself to the issues raised here?

5. The various opinions refer to criticisms of the U.S. public forum doctrine. However, these criticisms aside, to what extent does U.S. thinking influence the test each major justice offers? To what extent do the results reflect the U.S. approach? Have we in fact learned from the U.S. mistakes?

6. Chief Justice Lamer states in his s. 2(b) discussion: "As the Attorney General of Ontario properly points out, s. 2(b) of the Charter does not protect "expression" itself, but freedom of expression. In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole." Do you agree? What implications does this have for the broader approach to s. 2(b) issues, beyond the specific field of the public forum?

7. Do the various opinions comply with or depart from the original s. 1 test formulated in Oakes?

8. What test would you propose for deciding these cases?

9. Certain members of the Supreme Court appeared to feel that on an application of the U.S. public forum doctrine, airport public areas would surely be found to be public fora. Yet, subsequent to this decision, the U.S. Supreme Court decided the contrary. In **International Society for Krishna Consciousness v. Lee, (1992) 112 S. Ct. 2701** the court held that airport terminals are not public fora and that a regulation prohibiting solicitation of money in airport terminals is constitutional, but

a regulation prohibiting distribution of literature is unconstitutional. Five of the justices argued that airports are public facilities with the primary function of providing transportation services and that can restrict access for security purposes. Four others agreed with the ban, but rejected the majority's reasoning.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion.
KENNEDY, J., filed an opinion concurring in the judgment, in Part I of which
BLACKMUN, STEVENS, and SOUTER, JJ., joined. SOUTER, J., filed a dissenting
opinion, in which BLACKMUN and STEVENS, JJ., joined.

REHNQUIST, C.J.

...

The second category of public property is the designated public forum, whether of a limited or unlimited character--property that the state has opened for expressive activity by part or all of the public. Ibid. Regulation of such property is subject to the same limitations as that governing a traditional public forum. Id., at 46, 103 S.Ct., at 955. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. Ibid. The parties do not disagree that this is the proper framework. Rather, they disagree whether the airport terminals are public fora or nonpublic fora. They also disagree whether the regulation survives the "reasonableness" review governing nonpublic fora, should that prove the appropriate category. (FN4) Like the Court of Appeals, we conclude that the terminals are nonpublic fora and that the regulation reasonably limits solicitation.

FN4. Respondent also argues that the regulations survive under the strict scrutiny applicable to public fora. We find it unnecessary to reach that question.

(6) The suggestion that the government has a high burden in justifying speech restrictions relating to traditional public fora made its first appearance in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516, 59 S.Ct. 954, 963, 964, 83 L.Ed. 1423 (1939). Justice Roberts, concluding that individuals have a right to use "streets and parks for communication of views," reasoned that such a right flowed from

CHAPTER 15

THE VENUE OF EXPRESSION PART TWO - THE QUASI PUBLIC FORUM

Introduction

The preceding chapter deals with access to government-owned property. To what extent does **Charter** s. 2(b) guarantee a constitutional right to engage in expressive activity on privately owned property? This issue raises a number of important questions. Is the common law regime of private property itself subject to scrutiny under the Charter? Do government-owned properties which are declared to be open to expressive activity aimed at the public provide enough of an avenue for the average individual or group to reach the public with his, her or its message?

The issue of access to private property for expressive purposes is of particular importance to labour unions. Labour demonstrations often target a specific business or group of businesses with a view to putting economic pressure on them. The earliest significant Supreme Court pronouncement on s. 2(b) arose in such a context, namely the Dolphin Delivery case.

The discussion begins with the pre-Charter Canadian approach to this issue. Then, the frequently-shifting U.S. position is examined. Finally, the limited Canadian Charter jurisprudence is considered.

The Pre-/Charter Canadian Approach

Harrison v. Carswell, [1976] 2 S.C.R. 200.

[The accused, while involved in a labour dispute, sought to peacefully picket her employer, a tenant in a shopping plaza, and was charged by the owner of the plaza with trespassing.]

Dickson J.:-- ...

The evidence discloses that distribution of pamphlets or leaflets in the mall of Polo Park Shopping Centre or on the parking lot, has never been permitted by the management of the centre and that this prohibition has extended to tenants of the centre. The Centre as a matter of policy has not permitted any person to walk in the mall carrying placards. ...

Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others and to the extent

would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of the members of the public, doing violence to neither and recognizing the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based.

The respondent picketer in the present case is entitled to the privilege of entry and to remain in the public areas to carry on as she did (without obstruction of the sidewalk or incommoding of others) as being not only a member of the public but being as well, in relation to her peaceful picketing, an employee involved in a labour dispute with a tenant of the shopping centre, and hence having an interest, sanctioned by the law, in pursuing legitimate claims against her employer through the peaceful picketing in furtherance of a lawful strike ...

I would agree that it does not follow that because unrestricted access is given to members of the public to certain areas of the shopping centre during business hours, those areas are available at all times during those hours and in all circumstances to any kind of peaceful activity by members of the public, regardless of the interest being prompted by that activity and regardless of the numbers of members of the public who are involved. The Court will draw lines here as it does in other branches of the law as may be appropriate in the light of the legal principle and particular facts.

Notes and Questions

1. To what extent does this case reflect a judicial awareness of free expression values?

2. Quite apart from the charter, do you think that this case would be decided in the same way today under the common law? Why or why not?

The Erratic U.S. Position

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 291 U.S. 308 (1968).

[Logan Valley Plaza, Inc. (Logan) owned a large shopping centre complex. At the time of the events in this case, Logan Valley's tenants was Weis Markets, Inc., a supermarket. On December 8, 1965, Weis opened for business, employing a wholly nonunion staff of employees. A few days after it opened for business, Weis posted a sign on the exterior of its building prohibiting trespassing or soliciting by anyone other than its employees on its porch or parking lot. On December 17, 1965, members of Amalgamated Food Employees Union, Local 590,

Notes and Questions

1. Logan Valley makes reference to the previous decision in Marsh v. Alabama, 326 U.S. 501 (1946). That case involved a Jehovah's Witness who, while trying to distribute Witness literature on the sidewalk in a "company town", was informed that it was private property and she would have to leave. Upon refusing, she was with remaining on the premises of another after being warned not to do so. Black J., for the court, decided that a company town was still a town, with the normal public fora of any municipality. He stated, at 506:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

and, at 509:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. ... In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the States's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a State statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.

2. Four years after Logan Valley, a 5-4 court upheld a shopping centre ban on anti-war leafleting. Justice Powell distinguished Logan Valley on the ground that there, the union's picketing activities were related to the shopping centre's operations, whereas in Lloyd Corp., the handbilling was unrelated to shopping centre activities and alternative avenues of communication were available. Justice Marshall's dissent emphasized that many who do not have easy access to the mass media must rely on inexpensive methods of communication, like handbilling, and must be given broad rights of access for that purpose. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

3. Four years after Lloyd Corp., the Court announced that it had effectively overruled Logan Valley. Hudgens v. NLRB, 96 S.Ct. 1029 (1976). There, employees involved in a labour dispute with one of the tenants of a shopping mall sought to picket the tenant's stores, including that in the mall. The general manager of the mall, however, informed them that they could picket neither the mall nor the parking lot in front of it. A complaint was filed with the NLRB, which found that the petitioner, the owner of the mall, had committed an unfair labour practice

by excluding the pickets. Stewart J., in finding that the owner's regulation of access to the mall was constitutional, said:

> The Court in its Lloyd opinion did not say that it was overruling the Logan Valley decision. Indeed a substantial portion of the Court's opinion in Lloyd was devoted to pointing out the differences between the two cases... But the fact is that the Court's opinion in Lloyd cannot be squared with the reasoning of the Court's opinion in Logan Valley.
>
> It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of Logan Valley did not survive the Court's decision in the Lloyd case. ...[T]he ultimate holding in Lloyd amounted to a total rejection of the holding in Logan Valley...
>
> We conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.

4. Four years after Hudgens, the Court revived Logan Valley, at least in part, in Pruneyard Shopping Centre v. Robins, 447 U.S. 74 (1980). Technically, the narrow issue decided was that California's state constitution could compel access to private property without violating the owner's federal first amendment right not to be compelled to permit expressive activity on his property. As such, the Court's decision deferred to the state's prerogative to give state constitutional rights a broader scope than their federal counterparts. In this case, the shopping centre banned all expressive activity unrelated to its commercial purposes; students circulating a petition protesting a U.N. resolution against Zionism were excluded. Justice Rehnquist stated as follows:

> Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. They state that in Wooley v. Maynard, 430 U.S. 705 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of Wooley is that the State may not force an individual to display any message at all.
>
> Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping centre by choice of its owner is not limited to the personal use of appellants.

> It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law. ...
>
> Appellants are not similarly being compelled to affirm their belief in any governmentally prescribed position or view, and they are free to publicly dissociate themselves from the views of the speakers or handbillers. ...

5. Aside from being decided at regular 4-year intervals, are any of these cases consistent? Should Pruneyard be read as overruling Logan Valley, or does it truly rest on narrower grounds? Is Rehnquist's justifications persuasive? What are its implications for access to private property?

The Canadian Position Under the Charter

Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd. et al., [1986] 2 S.C.R. 573

The union was involved in a labour dispute with Purolator Courier. Dolphin Delivery did local deliveries for Purolator. The union wanted to set up picket lines at Dolphin. The matter of secondary pickets fell under federal jurisdiction and the Canada Labour Code is silent on this issue. Dolphin won an injunction to stop the pickets, and the Union challenged the injunction on the grounds that secondary picketing is a labour dispute was protected expression under s. 2(b). The Court held, (in a 5-2 split) that the appeal be dismissed. All picketing involves some form of expression and enjoys Charter protection unless some action on the part of the picketers alters its nature and removes it from Charter protection. Charter protection of this freedom does not encompass violence, threats of violence or other unlawful acts.

The picketing at issue, although intended to bring abouteconomic pressure and to induce the common law tort of breachof contract, was protected by the Charter. The Charter does not apply to private litigation completely divorced from any connection with government. Section 32 specifies that the Charter applies to the legislative, executive and administrative branches of government: their actions are subject to the Charter whether invoked in public or private litigation. An order of the Court, however, cannot be equated with government action for the purposes of Charter application notwithstanding political theory. The courts, while bound by the

party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.

Can it be said in the case at bar that the required element of government intervention or intrusion may be found? In Blainey, s. 19(2) of the Ontario Human Rights Code, an Act of a legislature, was the factor which removed the case from the private sphere. If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case -- assuming for the moment an infringement of the Charter -- would be on all fours with Blainey and, subject to s. 1 of the Charter, the statutory provision could be struck down. In neither case, would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a statutory provision violative of the Charter.

In the case at bar however we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the Charter applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the Charter. It follows then that the appeal must fail. The appeal is dismissed. The respondent is entitled to its costs. In the circumstances of this case, it becomes unnecessary to answer the constitutional question framed by the Chief Justice on September 5, 1984.

Notes and Questions

1. Harrison v. Carswell was decided before enactment of the **Charter**. Should it be decided in the same way today? See R. v. Layton (1986), 38 C.C.C. (3rd) 550 (Ont. Prov. Ct.) where a Toronto alderman was charged with trespass while attempting to distribute informational literature as part of a union organizing drive of the employees at the Eaton's Toronto Eaton Centre Store. Held: the activity was protected by section 2(b) as the literature was offered in a peaceful, friendly manner to store employees without inconveniencing them or other users of the common areas of the mall. The means chosen by the Trespass To Property Act clearly infringed the defendant's freedom of expression and could not be justified pursuant to Section 1.

2. In the Committee for the Commonwealth of Canada v. A.-G. Canada, discussed in the preceding chapter, Pratte J. in his dissenting judgement in the Federal Court of appeal suggests that section 2(b) does not include the right to use someone else's property to express yourself. MacGuigan J., writing for the majority in the Federal Court of appeal, distinguished Harrison v. Carswell on the basis that Dorval airport was public, not private property. The new Terminal III at Toronto International Airport is privately owned and operated, albeit using land leased from the federal government. Does this mean that one's ability to exercise s.2(b) rights at Terminals I and II, which are publicly owned and operated, will be different than at Terminal III? What about Buttonville Airport which is also privately owned and operated? What about Toronto's Pearson Airport if Terminals I and II are privatized?

3. If the government is entitled to limit access for expressive purposes to certain public property, should private property owners, including mall owners, enjoy similar rights?

4. What significance if any can be drawn from the fact that the **Charter** does not guarantee property rights, or economic rights in s. 7? To what extent could this form a principled basis for distinguishing U.S. jurisprudence in this area?

5. These cases are usually argued on the basis of **Charter** s. 2(b) alone. What impact, if any, would it have on these **Charter** claims if the plaintiff also predicated his or her arguments on **Charter** s. 2(c) (freedom of peaceful assembly) and s. 2(d) (freedom of association)?

6. In her Supreme Court opinion in Committee for the Commonwealth of Canada, discussed at length in the preceding chapter, McLachlin, J. stated: "freedom of expression does not, historically, imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the Charter does not extend to private actions. It is therefore clear that s. 2(b) confers no right to use private property as a forum for expression." In contrast, L'Heureux-Dube stated that: "For our present purposes it is only necessary to consider the Charter's impact on the distribution of leaflets on government property. The Charter's effect on leafleting on private property, as well as whether it gives the media a right of access to public property for the purpose of gathering news, are better left for another day." Which was right? Either? Both?

1. INTRODUCTION

The preceding chapters have addressed specific free expression topics which generally involve laws which apply to expression by the public generally. Attention now turns in a more focused way over the next few chapters to the **Charter** rights of mass media establishments as an institution within Canada.

In any constitutional regime of freedom of expression, mass media outlets will inevitably play a crucial role. This is because they are essentially in the expression business. They gather information and disseminate it to the public. They have an unparalleled capacity to reach a mass audience -a fact which affects both the importance of their claims to expressive freedom, and claims brought against them for the way in which they exercise that freedom.

Needless to say, many of the topics discussed in previous chapters will be of particular importance to media establishments. Libel laws are invoked more often than not against media defendants. Restrictions on commercial expression will heavily impact on the media, since the media are the main conduit for commercial expression. Restrictions on speech which threatens national security can collide with journalistic news-reporting activity, as most clearly demonstrated in the U.S. Supreme Court's Pentagon Papers decision (New York Times v. U.S., supra Chapter 8).

What is distinctive about the subjects to be covered in the following several chapters is that unlike the materials covered to date, they focus on legal restrictions which are targeted substantially, if not entirely at mass media establishments.

^This chapter provides a background to the constitutional issues which follow, by introducing the reader to the print and broadcast media, to the framework for their legal regulation, and to the rationales traditionally proffered for the existence of differential regulatory regimes for the print and broadcast media. The next chapter considers the constitutionality of legal regulations targeted at the ownership of media establishments, and of the regulation of the content of electronic media broadcasts. Thereafter, Chapter XV considers situations where the media is named as a defendant in a free speech case. These are situations where it is alleged that the media has itself infringed the freedom of expression of others.

Next, three chapters are provided which examine constitutional issues pertaining to the openness of Canada's justice system. Chapter XVI examines claims of a constitutional right to attend court proceedings. Chapter XVII examines the constitutionality of restrictions on factual reports about legal proceedings. Then, Chapter XVIII considers the validity of restrictions on criticism of court decisions and judicial behaviour. Open justice is, of course, a topic of concern to all, and not simply to the media. However, it is included in the midst of chapters dealing with specific media topics, because the media is almost always the key litigant in these cases, and

because the media plays an essential role in attending and reporting to the public on court cases.

The discussion of specific media topics concludes with Chapter XIX which considers whether and to what extent **Charter** s. 2(b) extends constitutional protection to news gathering activity. This includes an assessment of media claims to constitutional protection for news sources, for access to newsworthy events, and to the filming of news scenes.

There are several themes which should be considered in assessing free speech claims advanced in connection with the media. Among these are the following:

1. What is the function or role of the media within Canada's free and democratic society?

2. Does the **Charter** extend special rights to the media, over and above those enjoyed by the public generally? What is the relationship of the free expression guarantee in s. 2(b) to the free press guarantee in that clause?

3. What is the relative status of the various branches of the media under s. 2(b)? Is it constitutional to treat the print and broadcast media differently under the law?

4. Does the **Charter** impose any duties on the media?

2. REGULATORY FRAMEWORK - PRINT VERSUS BROADCAST

Royal Commission on Newspapers (Kent Commission) 1981.

[Note: The Kent Commission was a federally appointed royal commission into the newspaper industry in Canada in general, and into concentration of ownership in the print media in particular.]

Chapter 2 - The Public Trust [extracts]

It is generally agreed that the press has a responsibility to the public although there is little agreement on how to define it and even less on how to put it into practice. The existence of such a responsibility is, however, the cornerstone of the Commission. Without social responsibilities, the press would be but a business like others and the market its only law. There would be no special reason for the prime representative of the citizen, the State, to become involved. But what exactly is the responsibility of the press? On what philosophical and moral principles is it founded? On what historical traditions; what ground of law? What do owners, publishers, editors, reporters, and readers think and say about it? Here we examine all that constitutes the motivating force and moral framework of journalism.

the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled. ...

Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional. The judgment of the Court of Appeals in Red Lion is affirmed and that in RTNDA reversed and the causes remanded for proceedings consistent with this opinion.

Notes and Questions

1. The scarcity rationale has been attacked on a number of grounds. In Technologies of Freedom (1983), Ithiel de Sola Pool criticized the rationale in the following terms:

> The time has come in time to bury the old cliche that spectrum is a scarce resource. It is an abundant resource, but a squandered and misused one. Like any resource, it is limited, but like such other communications resources as paper, trees, printing presses, wires, or television sets, it is plentiful.
>
> As economists use the word, almost all resources are "scarce". That is to say, utilization of a resource withdraws it from alternative uses. Information is an exceptional resource for which this is not true. Giving information to one person does not reduce the amount of it available for another. Spectrum is not like that, but it is like water, paper, or petroleum in that use of it by one person limits what is available to others. In that technical sense it is scarce. But in the layman's sense, in which water is abundant but diamonds are scarce, spectrum is abundant. If it were sold at its true price, spectrum would turn out to be a bargain; there is much of it to be had. It is renewable; when a user has used it for one hour or a nanosecond, it is there afterwards for the next person to use. And what is more, technological progress over the past half-century has multiplied its availability.
>
> Spectrum shortage is thus no longer a technical problem but only a man-made one. The court in Red Lion was wrong.

De Sola Pool notes that there are numerous ways to expand the channels that are available for electronic communication, including storing the message in electronic memory to be delivered

when convenient, tighter channel spacing and localization, improvement of receivers, allocating new frequencies, compression, multiplexing, and by the use of enclosed carriers such as cable and fibre optics.

2. Similar rationales have been adopted by the D.C. Circuit in its decision in Telecommunications Research and Action Centre v. F.C.C., 801 F. 2d 501 (D.C. Cir. 1986). In that case, Justice Bork upheld the decision of the F.C.C. not to apply the fairness doctrine to Teletex, which he found to be a broadcasting service. He commented as follows:

> The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforseen technologies, inevitably leads to strained and artificial results.
>
> It is certainly true that broadcast frequencies are scarce but it is unclear that that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not the least newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt to use a universal fact as a distinguishing principle necessarily leads to analytical confusion.
>
> Neither is content regulation explained by the fact that broadcasters faced a problem of interference, so that the government must define useable frequencies and protect those frequencies from encroachment. This governmental definition of frequencies is another instance of the universal fact that does not offer an explanatory principle for differing treatment. A publisher can deliver his papers only because government provides streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are analogous to the government's functions in allocating broadcast vacancies, could justify regulation of the content of a newspaper to ensure that it serves the needs of its citizens.

3. In 1987, the F.C.C. announced that it was no longer going to enforce the fairness doctrine because of its belief that it was precluded from doing so by the Constitution. See 2 F.C.C. Record Vol. 17 5043 (1987) at 5058.

4. Does the scarcity rationale apply in practice? Most canadian cities have far more radio and T.V. stations than they have newspapers. The practical economics of the newspaper industry has made much of Canada into a collection of one or two paper towns. While the barriers to access may differ in the print and broadcast fields, does this difference make a constitutional difference?

with Grant, J., that no restriction on freedom of speech that offends the provisions of the Canadian Bill of Rights is thereby placed on the holders of broadcasting licences, nor do I see any discrimination against such licensees of the type enjoined by s.1 of the Canadian Bill of Rights. The prohibition applies without distinction to every broadcaster and every licensee of a broadcasting receiving undertaking.

Notes and Questions

1. The public property rationale was also adopted by the Federal Court of Appeal in the New Brunswick Broadcasting v. CRTC case supra.

c) Canadian Culture/National Unity:

Report of the Task Force on Broadcasting Policy, 1986 (The Caplan-Sauvageau Report).

The Public Character of Radio Frequencies

... Unlike American communications legislation which was designed primarily for co-ordination purposes, Canadian broadcasting policy has always pursued social and cultural objectives. It was never just because radio frequencies were scarce, but also because the Canadian presence on the airwaves was weak, that since 1929 commissions of inquiry into broadcasting have recommended strengthening the system. The assignment of radio frequencies for broadcasting in Canada is an essential component of national sovereignty.

Because of the urgency of the issue, Canada has always expected broadcasting to reflect the country's identity. From the outset radio and television were considered instruments for creative expression, education and information by and for Canadians rather than simply as entertainment media. The availability of a larger number of channels will do little or nothing to guarantee access or to ensure that the airwaves will reflect the Canadian identity and culture.

There are therefore still very good reasons for maintaining the public character of the radio frequencies used for broadcasting. It is not so much on the ground of the scarcity of radio frequencies that this policy is justified, but rather because of the importance of broadcasting in maintaining our national identity and expressing the values upon which our society is based.

Those who are granted the right to use radio frequencies are given an important responsibility. Contributing to the dissemination of Canadian culture is a duty inherent in the privilege they are granted as a public trust on behalf of Canadians...

1. INTRODUCTION

The question presented in this chapter is as follows: To what extent do regulations impinging upon the ownership or content of the broadcast media contravene the **Charter**? The chapter begins with a consideration of the impact of **Charter** s. 15's equality rights guarantee on this issue. Next, attention turns to federal regulation of the ownership of broadcast establishments. Thereafter, a consideration of the validity of regulations which purport to control the content of broadcasts is considered. Finally, attention turns to the regulation of cable television services.

In reviewing these materials, it is important to keep in mind the background materials set out in the preceding chapter. As well, consider whether the regulations imposed on the broadcast media in these cases could withstand constitutional challenge if they were imposed in identical terms on the print media.

2. DIFFERENTIAL TREATMENT OF THE PRINT AND BROADCAST MEDIA AND CHARTER SECTION 15

M. David Lepofsky, "Open Justice 1990 - The Constitutional Right to Attend and Report on Court Proceedings" (to be published by the Faculty of Law, University of Alberta, in proceedings of its Freedom of Expression Conference, April, 1990) [footnotes omitted].

At times, one branch of the media can be heard to complain that they are victimized by discrimination, if they feel that they are not treated as advantageously as other branches of the media. However, the media cannot use Charter s. 15's guarantee of equality rights to challenge the differential treatment of different media under legislation. Section 15(1) provides as follows:

> Section 15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 does not explicitly ban discrimination or differential treatment between the print media on the one hand, and the broadcast media on the other. While s. 15 addresses some forms of discrimination, in addition to those grounds specifically enumerated in it, the list of unenumerated grounds of discrimination is finite. Section 15 only prohibits legislative discrimination based on the enumerated grounds, and such additional grounds as are analogous to the enumerated grounds. A ground of discrimination is "analogous to the enumerated grounds if it involves discrimination based on an intimate human or personal characteristic, which is associated with a discrete and insular minority that has historically suffered from social or

(b) there has to be an individual (company) responsible for civil and criminal liability.

(3) However, the direction, in so far as it denies broadcasting licences to "newspaper proprietors", is inconsistent with and in violation of the appellant's right of freedom of the press and other media of communication guaranteed to everyone by s-s. 2(b) of the Charter. Further, in so far as the direction denies to the public broadcasting service because a newspaper proprietor controls a broadcasting undertaking, it is inconsistent with and in violation of the rights and freedoms guaranteed to everyone by s-s. 2(b) of the Charter.

In my opinion, the argument confuses the freedom guaranteed by the Charter with a right to the use of property and is not sustainable. The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. it gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes. And it gives no right to anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by parliament to be and had become public property and subject to the licensing and other provisions of the Broadcasting Act. The appellant's freedom to broadcast what it wishes to communicate would not be denied by the refusal of a licence to operate a broadcasting undertaking. it would have the same freedom as anyone else to air its information by purchasing time on a licensed station. Nor does the Charter confer on the rest of the public a right to a broadcasting service to be provided by the appellant. Moreover, since the freedom guaranteed by para. 2(b) does not include a right for anyone to use the property of another or public property, the use of which was subject to and governed by the provisions of a statute, there is, in my opinion, no occasion or need to resort to s.1 of the Charter to justify the licensing system established by the Broadcasting Act.

Accordingly, I would reject the appellant's submission.

Notes and Questions

1. Would it violate **Charter** s. 2(b) for the CRTC to order the CTV network to divest itself of a number of its stations, for the purpose of fostering diversity in the broadcast media? Would the answer depend on the scope of the required divestiture?

2. Note that one of the earliest **Charter** decisions of the supreme Court of Canada is Hunter v. Southam, [1984] 2 S.C.R. 145 where the court found that an investigative search of the Southam chain by the federal anti-combines agency violated **Charter** s. 8's guarantee of unreasonable search and seizure, due to the absence of an independent warrant mechanism to authorize such searches.

3. Is there a constitutionally "correct" mix of ownership in the media?

4. Could it be argued that excessive concentration of ownership in the media violates **Charter** s. 2(b)?

5. Assume a variation on the facts of the foregoing judgement. Assume that the combines investigation branch of the federal government takes proceedings against New Brunswick TV for monopolizing the media market in a particular region. The NBTV is claimed to have lessened or eliminated competition in the relevant market area. Would such a prosecution violate **Charter** s. 2(b)? Is there any difference in the analysis of this problem, and the analysis of the issue in the decision supra?

6. Do these concerns about corporate concentration in the media apply to the largest broadcast media establishment in Canada, namely the CBC/Radio Canada?

4. REGULATION OF BROADCAST CONTENT

The CRTC and its related legislation impose a myriad of controls and restrictions on the content of broadcasts by the electronic media. The most commonly known of these are the Canadian content requirements. However, additional requirements focus on the amount of news content per day, as well as other considerations. To what extent do these requirements raise **Charter** concerns?

Federal Communications Commission v. Pacifica Foundation, 438 U.S. 723 (1978).

Stevens, J.:

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio

nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." ...

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. ...

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "the words you couldn't say on the public...airwaves," explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F.C.C.2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

[Stewart J., in his dissenting judgment, held that the statute ought to be interpreted so as to prohibit only obscene speech.]

Notes and Questions

1. Assume that a comparable policy were imposed by the CRTC on the broadcast of such materials on television in Canada. Would this have any practical effectiveness, in light of the pervasive use of video cassette recorders?

2. What if the impugned policy provided instead that no broadcast shall deal with solicitation of money by any religion or religious organization? Would it withstand Charter scrutiny?

3. Should the Pacifica outcome be different if the FCC had banned use of the particular words at any time of day or night?

4. Assume that this policy was imposed on the CBC. By virtue of the fact that the CBC is a publicly owned broadcaster, is its constitutional position different from that of private sector broadcasters? Does the CBC have constitutional rights under **Charter** s. 2(b)? Can the CBC itself challenge the constitutionality of its own governing legislation, or of legislation governing the administrative agency which licenses and regulates it? Alternatively, does the Charter bind

4. In order to render the licensee's guidelines truly effective, it is a condition of licence that the licensee file with the Commission, within sixty (60) days of the date of this decision, amended guidelines specifying the manner in which all persons mentioned on the air are to be treated, whether they are present in the studio or not, taking into account the basic respect owed to such persons in conformity with the high standard requirement. The amended guidelines, once approved by the Commission, shall replace the guidelines approved on 13 October 1989, and adherence to them shall be a condition of licence. moreover, copies shall be provided by the licensee to any interested party upon request.

5. It is a condition of licence that the licensee inform its audience of the existence of the guidelines referred to in condition of licence #3 above and, as of their effective date, those referred to in condition #4. This shall be accomplished through an announcement of at least 30 seconds duration and in a form approved by the Commission, and broadcast by CHRC-daily, Monday to Friday, immediately following the 8:00 a.m. newscast or, in the absence of such newscast, at 8:00 a.m. In particular, the announcement shall mention that a copy of the guidelines will be provided by the licensee to all interested parties upon request.

6. It is a condition of licence that the licensee adhere to the Canadian Association of Broadcasters' (CAB) self-regulatory guidelines on sex-role stereotyping, as amended from time to time and approved by the Commission.

7. It is also a condition of licence that the licensee adhere to the provisions of the CAB's Broadcast Code for Advertising to Children, as amended from time to time and approved by the Commission.

Notes and Questions

1. What impact, if any, could **Charter** s. 15 have on the matters addressed in these two cases?

2. In light of the materials set out in the preceding chapter on the rationales for regulation of the broadcast media, do the traditional explanations for the regulation of the broadcast media withstand **Charter** scrutiny?

3. Assume that in either of the two preceding cases, a subsequent CRTC hearing is held, to inquire into contraventions of licensing requirements alleged to have been committed. The CRTC releases a decision indicating its outrage at the licensee's continued disregard of the law and CRTC policy. The license is thereby cancelled. The licensee exercises a statutory right to appeal this decision to the federal Cabinet - an appeal which is considered by Cabinet on the basis of written submissions only. Cabinet affirms the CRTC license revocation without detailed written reasons. In fact, the Cabinet decision is set forth in a letter which simply states that "The

CRTC decision is affirmed".

You are consulted by the irate station owner, who has strong suspicions that Cabinet's true reasons for refusing to reinstate the license is because the station has given highly critical coverage to the federal government, and further because the station is located in a hotly contested federal riding. What **Charter** relief might be available? How could the station prove its claim?

4. Is there any analogy between the legal analysis in the public forum area and the analysis which might be applied in the broadcast regulation context?

5. Could the government set up a regulatory agency to license daily newspapers? Could such an agency impose the same requirements on newspapers as are dealt with in these cases?

6. Consider again the Red Lion case and the validity of requirements that a broadcaster give time to opposing viewpoints and persons attacked on the media. Are these kinds of content regulations somehow different in character from the kinds dealt with in these two judgements, from the charter perspective?

5. REGULATING CABLE T.V. SERVICES

Quincy Cable TV v. F.C.C., 768 F. 2d 1434 (1985).

Wright J.:

FCC regulations require cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is "significantly viewed in the community" or otherwise considered local under the Commission's rules. ... Alleging that these mandatory carriage or "must-carry" rules violate the First Amendment rights of cable programmers, cable operators, and the viewing public, Turner Broadcasting Systems, Inc. (TBS), the owner of a variety of cable services, petitioned the FCC to institute rulemaking procedures to delete the offending regulations. Although acknowledging that the challenged rules deprive cable programmers of access to some audiences and "compel carriage of broadcast signals in place of alternate programming that subscribers, if given a choice, might otherwise choose," the Commission denied TBS's petition. ... TBS now petitions for review of that denial. In a separate action, Quincy Cable Television, Inc. (Quincy), the operator of a cable system in Quincy, Washington, petitions for review of an FCC order requiring it to carry the signals of several local broadcast stations and imposing a $5,000 "forfeiture" for its failure to do so.

In the course of reviewing those petitions, we have concluded and now hold that the

Notes and Questions

1. Is it consistent with the purposes for guaranteeing freedom of expression in the **Charter** for a court to enunciate a hierarchy of media of communications for **Charter** purposes?

2. An irate resident of a northern Ontario town, who subscribes to the only cable TV service available in that community, has just received his monthly cable bill. He is outraged to see that the monthly rate has gone up, with the approval of the CRTC, and discovers a letter from his friendly cable service which explains why the increase has occurred. The CRTC has approved a new cable channel to deal exclusively with religious broadcasts. CRTC has required all cable services to include this "Pray TV" channel in their service to all customers, and makes this a condition of licensure of the cable service. As part of the deal, CRTC has approved a price increase to pass the related charges on to the consumer. The cable company's letter indicates that for its part, it would have preferred not to include this religious channel, and not to raise prices. However, if forced to carry the channel, the price hike is inevitable, the letter says.

Does the customer have a **Charter** complaint? Would it make a difference if, absent this cable service, no TV signal would be available in this northern Ontario town, unless a pricey satellite dish is installed? Would it make a difference if, instead of Pray TV, this new channel was an all-sports service that the customer does not want to receive?

3. Assume that a condition of a cable TV license is that the cable company make available a community access channel, which is open to use by private groups free of charge. Assume further that the CRTC does not allow the cable company to refuse to make the community channel available to any group on account of the group's message. A racist group seeks to put on a program advocating a more restrictive immigration policy in Canada. The cable company wishes to refuse to allow this group onto the community access channel. What is the **Charter** position of the cable company, the CRTC which is asked to release the cable company from its obligations of access in this episode, and the anti-immigrant group?

6. REGULATING THE INTERNET

Title XIII - Children's Online Privacy Protection Act of 1998

SEC. 1302. DEFINITIONS.

(1) CHILD.—The term "child" means an individual under the age of 13.

(2) OPERATOR.—The term "operator"—

(A) means any person who operates a website located on the Internet or an online service and who collects or maintains personal information from or about the users of or visitors to such website or online service, or on whose behalf such information is collected or maintained,

1. INTRODUCTION

Ordinarily, the media finds itself as the plaintiff or applicant in **Charter** cases, and is in the position of asserting a free expression claim. In that capacity, media advocates usually call for a broad definition for **Charter** s. 2(b), so as to maximize the scope of its protections. However, what happens when the tables turn, and the media becomes the defendant in a **Charter** case? This unusual situation could arise in a situation where a member of the public claims that the media have infringed their freedom of expression. Perhaps the most obvious example of this would be where members of the public contend that they have a constitutional right of access to the media. In such situations, the media is confronted with challenges to its authority, its ethics, and the scope of its power. Such cases call upon society to view the media as a player in the world of politics and ideas, and not simply as a conduit for information, or as a surrogate for the public.

This chapter focuses on the question whether, and to what extent, the media can itself be the targets of free speech claims. It begins with a consideration of the question whether the public has a right of access to the media, so as to get air time or print space to get their own message across through the instrumentality of the press or broadcast media. Next, attention turns to the question whether individual journalists have some redress if their media employer attempts to limit their expression. Finally, the question of whether members of the public have some redress against a media establishment to ensure that their interview is accurately quoted, is considered.

2. RIGHT OF ACCESS TO THE MEDIA

The concern about access to the media is of particular importance in light of two developments. First, through the expansion in this century of the media from print, to radio, and then to television, the capacity of the media to rapidly reach a large audience, and to influence public opinion has grown substantially. Second, the increasing concentration of ownership of the media, and the substantial barriers to entry into the media marketplace as a competitor, combine to undermine the capacity of competition among media establishments to serve as an independent force to ensure the airing of as diverse a range of viewpoints as possible.

In the face of these circumstances, it is contended either as a matter of legislative or regulatory policy, or as a matter of constitutional right, that members of the public should have a right of access to the media, so as to ensure that a diversity of opinions and viewpoints can vie for acceptance in the marketplace of ideas. Within the institutional media, resistance to such claims arise from a strong desire for the media to retain sole authority over what messages are disseminated by way of print or broadcast. Owners of media establishments may well protest that others should not be able to use their property to disseminate a message of which the owner

the offering of commercial services to the public...That part of the paper is not concerned with freedom of speech on matters of public concern as a condition of democratic policy, but rather with the provision of a "service or facility customarily available to the public" with a view to profit. As such, in British Columbia a newspaper is impressed with a statutory obligation not to deny space or discriminate with respect to classified advertising, unless for reasonable cause...The effect of s.3 of the British Columbia Human Rights Code is to require newspapers within the province to adopt advertising policies which are not in violation of the principles set out in the Code.

Notes and Questions

1. What arguments are there for and against the proposition that s. 2(b) of the **Charter** creates a constitutional right of access to the media? What arguments are there for and against the proposition that a statutory right of access to the media contravenes **Charter** s. 2(b)? Which case is more persuasive?

2. Is there good reason for the differing approaches taken to this issue in the U.S. decisions of Red Lion and Miami Herald? Is the traditional differential approach to the regulation of the print and broadcast media valid in this context? Do the traditional arguments favouring regulation of the broadcast media warrant the establishment of a legally-enforceable right of public access to the media?

3. Would your answer to the preceding questions be different if the defendant is the CBC or TV Ontario on the one hand, or is CTV or Global Television on the other? What about CBC News World, a joint venture between public and private sector media?

4. One key argument against a section 2(b) right of access t the media, at least vis a vis the privately-owned media, is that according to **Charter** s. 32(1), the **Charter** only imposes obligations on government, and not on private action. In R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 537, the Supreme Court of Canada held that the **Charter** does not apply to a court order, enjoining a labour picket, issued in a private law suit, where no legislation is impugned. Is this result correct? Would this "government action" problem be removed from the debate if a court held that the common law creates a public right of access to the media? Is there any basis for such a common law holding? Regarding the scope of the government action doctrine, see e.g. Blainey v. Ontario Hockey Association (1986), 26 D.L.R. (4th) 728 (Ont. C.A.); McKinney v. University of Guelph (1987), 46 D.L.R. (4th) 193 (Ont. C.A.)

5. If there is to be established a public right of access to the media, what would be the scope of this right? Who would enjoy this right? When could they invoke it? What must a newspaper, radio station or TV station do to fulfil its obligation in this regard?

6. Elsewhere in these materials, there is a discussion of the "public forum" issue, which

considers whether the public has a constitutional right under s. 2(b) to engage in expressive activity such as leafleting or demonstrating on government-owned property, or on publicly-accessible private property, such as a shopping centre (See e.g. A.G. Canada v. Committee for the Commonwealth of Canada, [1987] 2 F.C. 68 (Fed. C.A.)). Are there any common themes between the public forum issue and the access to the media issue? How can doctrine in these two areas be harmonized?

7. How should the Gay Alliance case be decided now that there is a Charter of Rights? Was Martland J. in a stronger position, or a weaker one?

8. Assume that the Gay Alliance case was litigated in 1990, and that evidence was produced at the human rights inquiry which documents that the reason why the Vancouver Sun refused to publish the advertisement of the Gay Alliance was because of pressure from its subscribers and other, more frequent ad sponsors. These groups oppose the goals of the Gay Alliance and have threatened a boycott if the paper runs such ads. What impact, if any, does this have on your answer to the previous question?

9. Would your answer be different if the Vancouver Sun's largest shareholder professes religious beliefs which are strongly opposed to the views of the Gay Alliance?

10. Assume that the CRTC requires all broadcast media to allocate free time to the major political parties during an election, on a formula based on the parties' representation in the previous parliament or legislature. A new, alternative party gets no free air time under this requirement. Do they have an s. 2(b) claim? Do the media establishments have a s. 2(b) claim to challenge the CRTC policy? If you were acting for the new political party, what tactical advice would you offer your client regarding the structuring of their claim and the presentation of evidence?

11. Would your answer to the preceding question be different if the same CRTC policy applied to the provision of free broadcast time during the term of a government i.e. when no election campaign is in progress?

12. How would you answer the two preceding questions if the policy were also applied to newspapers? To weekly magazines?

13. Would your answer to the preceding questions be different if the new political party was called the Canadian Nazi Party, and preached a fascist philosophy and platform?

14. Assume instead that the CRTC policy required the broadcast media to provide equal time to persons who were the subject of attacks on their character, their reputation, or their conduct? What is the position of such a policy under the **Charter**? What if the same policy also applied to the print media? How does the constitutional approach to this policy differ from the policy regarding free time advertising by political parties?

15. Assume instead that the CRTC policy required the broadcast media to provide reasonable opportunity for the airing of competing viewpoints on issues of public interest or concern. What is the constitutional status of such a policy? As applied to the print media?

16. A student newspaper at a post-secondary institution wishes to publish a story criticizing the school's administration on its new proposed policy regarding hiring minorities. The school administration, which finances the paper along with advertisements solicited by the paper's student staff, pressures the paper not to run the story, for fear of inciting disorder on the campus. The students want to launch legal proceedings to secure their right to run the paper. What advice do you give them? Would your answer be different if:

(a) the school in question is the University of Toronto, or
(b) the school in question is a provincial community college, which is funded and administered by the provincial government, or by officials appointed thereby?

17. Assume that the CRTC adopts a policy requiring radio stations to:

(a) allocate a designated amount of broadcast time to "call-in"programs, and
(b) mandating that such programs must ensure that among those who call in to be on the air, there must be afforded a reasonable access for different viewpoints on topics of public interest.

Would either or both aspects of this policy be valid under the **Charter**? What if the same policy were extended to the television media? What if an analogous policy were extended to daily newspapers, i.e. requiring them to allocate a certain amount of space to letters to the editor?

18. Cable TV companies are often required to maintain a community access channel, and to provide facilities for its use by community groups. Is this policy required by the **Charter**, a violation of the **Charter**, or neither?

19. A member of the public seeks your **Charter** advice. She is outraged that a newspaper, which had criticized her conduct, has apparently refused to print her letter to the editor. She has sent the letter in several times, and has unsuccessfully attempted to reach the paper's editor in chief by phone. Does she have any remedy under the **Charter**? Would your answer be different if this disgruntled individual was

(a) the minister of the environment, whom the paper had described as a lackey of the province's worst polluters;
(b) a spokesperson for a large corporation, whom the paper had labelled as one of the province's worst polluters, or
(c) a tenant in a public housing development, whom the paper had alleged to be under criminal investigation for drug dealing, and who, in her letter to the editor, claimed that the paper's biggest sponsor, a large corporate polluter, had both trumped up the charges and planted the newspaper story to discredit her environmental activism.

20. Elsewhere in these materials, we consider whether s. 2(b) guarantees to the media any constitutional protection for the news-gathering process, including a constitutional right to the news. In seeking to enunciate a coherent body of free expression principles, is it possible for Canada's system of freedom of expression to include both a public constitutional right of access to the media, and for the media to have a constitutional right of access to news? If not, which of these claims must give way?

21. The Supreme Court of Canada has retrenched a bit on the approach taken to the provision of goods and services in **Gay Alliance** in **Berg v. U.B.C. (unreported) June 21, 1993 SCC**. The Court held that student examination and records services offered by a university could not be denied to a student on the basis of disability since the services are "customarily available to the public".

4. CONTROL OVER THE PUBLICATION OR BROADCAST OF INTERVIEWS

The media generally would contend that only it can decide what portions of an interview with a member of the public should be broadcast or published. Reporters are ordinarily not desirous of having an interviewee pick and choose which portions of an interview can be published. They fear that an interviewee might attempt to manipulate a story, or retract embarrassing statements, through this process. They also hold to the fundamental tenet of journalism that it is for the media to decide what should be printed or broadcast, and not for interviewees. The interviewee's control over the process, they would contend, occurs at the interview itself, when the interviewee is free to decide what to say, and what not to say.

In contrast, an interviewee might protest that if there is no control over the use of the interview, it is open to the media to edit the interview in a fashion which, intentionally or unintentionally, will leave the public with an unfair or inaccurate perception of the interviewee's views or statements.

To what extent does the **Charter** enable an interviewee to insist on having a role in the selection of portions of an interview to publish or broadcast?

Canadian Broadcasting Corporation; Journalistic Policy; (Ottawa: C.B.C. 1982), at pp. 44-6

RIGHTS OF INVITED PARTICIPANTS AND INTERVIEWEES

The interviewer must inform the interviewee before the interview about the purpose for which it will be used. The interviewee must also be given some indication of the probable length of the interview to be included in the program, recognizing that such length is no more than an estimate, and that in some cases the interview may not be used at all. In using an interview, the CBC must conduct itself in accordance with the conditions agreed to prior to the interview. ...

With Canada's mainstream mass media being highly concentrated and corporate in structure, to what extent does freedom of press amount to a corporate right, and to what extent is it an individual right? What authority does the media, public or private, have to take action against its employees if they express a public viewpoint which is discordant with the corporate position taken by their employer? Do journalists have any protection against infringements of their freedom of expression by the media?

Notes and Questions

1. A journalist who hosts an open-line radio program is elected as president of the union which represents journalists working for his employer. He makes a public statement about the union's opposition to the impending free trade agreement between Canada and the U.S. His employer takes disciplinary action against him, because his action allegedly undermines the public's perception of him as politically neutral -- a perception which the employer considers especially important in light of the fact that as an open-line talk show host, it is critical that the audience perceive the broadcaster as affording to all a fair chance to voice their views.

Does the journalist have a constitutional complaint against his employer? What if the employer is a private sector broadcaster? What if the employer is the CBC?

2. Would your answer to the preceding question be different if the journalist was a news reporter, instead of a talk show host? What if he was the anchorperson on the nightly national news? What if he is an editorial columnist?

3. Assume that the journalist in the foregoing questions files a complaint against his employer with the CRTC. Assume that the CRTC has a policy that licensees must allow their staff reasonable protection for their freedom of expression, so long as it is not in conflict with their work responsibilities. Assume further that the CRTC accepts the journalist's complaint, and proposes to take action against his employer. Does the employer have any **Charter** redress?

4. Are your answers to the preceding questions different if the journalist was working for a newspaper?

5. Would your answers to the foregoing questions be any different if the journalist could produce evidence of intense corporate concentration in the media? What if his employer produced contrary evidence, showing a strong measure of competition in the media marketplace?

1. INTRODUCTION

"A trial is a public event. What transpires in the court room is public property (Craig v. Harney 67 S. Ct. 1249 (1947), per Douglas J. at 1254)

The following section deals with freedom of expression and press issues relating to the operation of the justice system. These issues can be compendiously referred to as "open justice" issues, since they all pertain to the extent to which our justice system is open to the public.

This unit is divided into three chapters. This chapter examines the extent to which the public, including the press, have a constitutional right to attend court proceedings under the **Charter**. Chapter XVII examines the constitutionality of restrictions on the reporting or dissemination of factual information about court proceeding, especially (though not exclusively) when the case is still pending, or "sub judice". Chapter XVIII addresses the question whether the **Charter** guarantees a constitutional right to criticize judges, courts, and court decisions.

In considering the issues raised in these chapters, there are several overarching questions which should be contemplated. First, why is it that there has been so much free expression litigation in the open justice area? This is perhaps the single most litigated subject under s. 2(b) of the **Charter** to date. Second, what values or interests are at stake when we consider the extent to which the justice system should be open to public attendance, and subject to media reporting? The open justice subject is traditionally called the "free press/fair trial debate". However, are free press and fair trial the only issues at stake in this area? Is the open justice subject fundamentally a "debate" or a reconciliation of these and perhaps other values? Third, why is it that the law regulates speech about the judicial system more intensely than speech about any other public institution? Is there something different and unique about our justice system, meriting this legal attention? Alternatively, are legislators, judges and lawyers more attentive to this public institution because it is the one with which they have the closest association and familiarity?

Long before the **Charter**, there has evolved a strong common law and statutory requirement that civil and criminal courts conduct their proceedings in public. In the criminal law particularly, exceptions to this openness requirement were few in number, and were required to be narrowly construed. (See M.D. Lepofsky; Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings; (Toronto: Butterworths, 1985) at pp. 23-44). The conduct of criminal proceedings in private, contrary to this requirement, amounted to a jurisdictional error, which could lead to the quashing of a conviction (see R. v. Greenwood, [1948] 2 D.L.R. 347 (Alta C.A.))

The common law and statutory tradition of court proceedings in public was very rarely if ever linked to values of freedom of expression and press. Rather, it was tied to concerns that courts be accountable, that witnesses be compelled by public scrutiny to give honest testimony,

that justice both be done and be seen to be done, and that abuse by judges, police and prosecutors be prevented (A.G. N.S. v. MacIntyre, [1982] 1 S.C.R. 175).

The questions presented in this chapter include the following: Can this tradition of open court proceedings be translated into a constitutional right of the press and public to attend court proceedings? If so, what limits on public attendance in court could be justified under s. 1 of the **Charter**? If there is a constitutional right to attend court proceedings, what is the ambit of this right? Does it include a right to inspect or copy court exhibits? Does it include a right of the media to televise court proceedings? Moreover, if there is a **Charter** right to attend court proceedings, does it extend to proceedings before administrative tribunals?

2. THE RIGHT TO ATTEND COURT PROCEEDINGS

Richmond Newspapers, Inc. v. Virginia 100 S.Ct. 2814 (1980)

[In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death. In attendance at Stevenson's fourth trial (after a reversed conviction and two mistrials) were two reporters for the appellant newspaper. At the beginning of the fourth trial, counsel for the defendant moved that it be closed to the public and the prosecutor assented. The judge agreed and closed the trial. That same day the appellants sought a hearing on a motion to vacate the closure order. The judge granted the hearing but denied the motion.]

Burger J.: ...

B

As we have shown, and as was shown in both the Court's opinion and the dissent in Gannett, 443 U.S., at 384, 386, n. 15, 418-425, 99 S.Ct., at 2908, 2908, n. 15, 2925-2929, the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. ... Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

> "Without publicity, all other checks are insufficient: in comparison to publicity all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks

interest - the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in [the statute] will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense. Although [the law] bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus [the legislation] cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, [the legislation] hardly advances that interest in an effective manner. And even if [the law] effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify.

[Chief Justice Burger and Justice Stevens wrote dissenting opinions]

Notes and Questions

1. The U.S. Supreme Court relied on the First and Ninth Amendments together to find a constitutional right to attend court proceedings. The Ninth Amendment provides as follows:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Previously, the court had concluded that the Ninth Amendment implicitly recognized the existence of unenumerated constitutional rights - a finding that contributed to the court's recognition of constitutional rights to use contraceptives (See Griswold v. Connecticut 381 U.S. 479 (1965)) and to abortion (Roe v. Wade 410 U.S. 113 (1973)). The **Charter**'s counterpart to the Ninth Amendment is s. 26, which provides as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Should **Charter** s. 26 be used to recognize the existence of unenumerated constitutional rights, beyond those explicitly listed in ss. 2 to 23? Is U.S. Ninth Amendment jurisprudence, such as that found in Richmond Newspapers, appropriately applied in Canada?

2. What functions are served by the constitutional right to attend court proceedings

identified in Richmond Newspapers?

3. What test must be met to justify exclusion of the public from a court proceeding in the U.S.? What evidence must be tendered to warrant such an order?

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (Re R. v. Carson), [1996] S.C.J. No. 38 Supreme Court of Canada

The accused pleaded guilty to two charges of sexual assault and two charges of sexual interference involving youngfemale persons. On a motion by the Crown, consented to by defence counsel, the trial judge ordered the exclusion of the public and the media from those parts of the sentencing proceedings dealing with the specific acts committed by the accused, pursuant to s. 486(1) of the Criminal Code. Theorder was sought on the basis of the nature of the evidence,which the court had not yet heard and which purportedly established that the offence was of a "very delicate" nature. The exclusion order remained in effect for approximately 20 minutes. Afterwards, following a request by the CBC, the trial judge gave reasons for making the exclusion order, stating that it had been rendered in the interests of the "proper administration of justice"; it would avoid "undue hardship to the persons involved, both the victims and the accused". The CBC challenged the constitutionality of s. 486(1) before the Court of Queen's Bench. The court held that s. 486(1) constituted an infringement on the freedom of the press protected by s. 2(b) of the Canadian Charter of Rights and Freedoms but that the infringement was justifiable under s. 1 of the Charter. The court also held that the trial judge had not exceeded his jurisdiction in making the exclusion order. The Court of Appeal affirmed the judgment.

The judgment of the Court was delivered by

[para1] LA FOREST J.:-- This appeal is brought by the Canadian Broadcasting Corporation ("CBC") from the judgment of the New Brunswick Court of Appeal dismissing an appeal from a decision of Landry J. who had refused to quash an order of Rice Prov. Ct. J. restricting public access to the courtroom. The order in question was made pursuant to s. 486(1) of the Criminal Code, R.S.C., 1985, c. C-46, which reads:

> 486. (1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

raised in the application, there will be no order as to costs.

Notes and Questions

1. A reporter gets a tip that charges have been laid against a prominent individual arising out of a well-publicized scandal. He appears at a court office, and asks to see the summons, issued by a justice of the peace against the accused, and the information, sworn before the justice of the peace, in support of the charges. He also asks the court official for confirmation that the charges have in fact been laid. In fact, the summons has been issued, but has not yet been served. The accused is not yet aware that he is being charged. The proceeding in which the justice of the peace issues the summons is ex parte, but is not in camera. Does the official have any constitutional obligation to answer the verbal inquiry, or to provide the reporter with a chance to look at or copy these documents?

2. At an inquest into the death of an impoverished, homeless person on Toronto's streets, the coroner decides to allow the coroner's jury to hear the testimony of a "street person" about what it is like to live as a homeless person in a large city. A witness agrees to come forward and testify about this, on the condition that he is not required to give his name in his testimony. The Coroner agrees to these terms.

A media establishment objects to this arrangement, and asks the coroner to compel the witness to testify to his name during the proceedings. After the coroner refuses this request, the media applies to court for an order compelling the coroner to require the witness to divulge his name in his testimony. The media relies on **Charter** s. 2(b), and the right of the public to access to judicial proceedings. Does s. 2(b) entitle the public or the media to know the witness's name, and to have the coroner compel the witness to disclose it in open inquest proceedings? See Canadian Newspapers Co. v. Isaac (1988), 62 O.R. (2d) 698 (Div. Ct.).

3. One Lortie entered the Quebec Legislature with a firearm, and opened fire on several persons. At his ensuing criminal trial, the Crown submitted into evidence a video tape of these events, recorded at the scene of the crime by the television cameras installed in the legislative building. During Lortie's appeal from conviction to the Quebec Court of Appeal, one media establishment applied to the court for a copy of the video, with the intention of broadcasting it as part of the station's news coverage of the case. The media argued that **Charter** s. 2(b) entitles the station to have access to a copy of the video, for copying purposes, since it was an exhibit at trial. See Lortie v. The Queen (1985) 21 C.C.C. (3d) 436.

4. Would your answer to Question 3 be different if some media establishments, competitors of the applicant T.V. station, had previously been provided with copies of the same video by the authorities?

5. In an effort to fully document the authenticity and voluntariness of confessions given by

accused persons while in custody, a number of police forces have established a program of video taping such confessions, with the accused's consent. The video tape is submitted into evidence at trial as proof of the confession, and of its voluntariness. In one such case, the video tape is admitted into evidence at a criminal trial as an exhibit. The media ask for access to it, for the purpose of copying it for broadcast, and relies on **Charter** s. 2(b). Is this a good Charter claim? What arguments are available under s.1? What position would you take if you acted for the accused person? Does this situation differ in any material way from the Lortie case discussed in the previous notes?

D. TELEVISING COURT PROCEEDINGS

With the advent of television in the second half of the 20th century as a predominant force in the news field, media establishments have demanded to be permitted to use cameras in courtrooms to film court proceedings. Although cameras in the courtroom is largely discussed as a question pertaining to the television medium alone, newspapers have an interest in using still photography in courtrooms as well.

In the U.S., cameras were essentially banned from the courtroom as of 1965, when the U.S. Supreme Court decided in Estes v. Texas, 381 U.S. 532 (1965) that filming in court constituted a per se violation of the accused's due process rights under the Fourteenth Amendment. In other words, the court was taken to hold that cameras in the courtroom automatically prejudiced a fair trial, and that their use amounted to a denial of the accused's due process rights, even in the absence of specific proof of actual prejudice.

In the 1970s, with the advent of the smaller, quieter "minicam" video camera, which operated without requiring substantial extra lighting, the American media began a fresh effort to introduce cameras into courtrooms. In the mid 1970s, the state courts of Florida were petitioned by Post-Newsweek to experiment with cameras in the courtroom. After a one year experimental period, the Florida Supreme Court (which had authority to make rules regarding cameras in the courtroom) decided to amend the canons of judicial ethics, so as to allow the use of cameras in courtrooms, even over the objection of litigants and witnesses. Cameras could only be excluded if a party could affirmatively prove that they would be prejudicial, in a fashion which is qualitatively different than the impact of open court proceedings. (See In Re Petition of Post-Newsweek Stations 370 So. (2d) 764 (S.C. Fla. 1979)

Other state courts eventually followed Florida's lead, and introduced cameras into courtrooms on a trial or permanent basis. In excess of 40 states now allow for cameras in the courtroom, though they remained banned from federal courts. State court rules vary widely. Some only allow filming in appeal courts. Some only allow filming with the consent of parties or witnesses. Some permit filming over the objection of parties, subject to exceptions in the case of testimony of children, sex crime victims, or other special cases.

The fair and impartial administration of justice requires a calm, dignified atmosphere. If photographing and televising is permitted of persons entering or leaving the court-room, that atmosphere will, I believe, be disrupted.

Furthermore, the taking of photographs of persons entering or leaving the court-room, can, in my opinion, lead to "wolf-pack" journalism in which photographers and cameramen descend en masse on the person that they wish to photograph. Without s. 67(2)(a) (ii) the photographers would be able to stalk the hallways of the court-house, waiting to pounce on participants as they move in and out of the court-room. This can lead to shoving and shouting outside the court-room door and the consequent disruption of proceedings in the court-room.

In many court-houses in*Ontario,*the only place to interview clients and witnesses is in the corridor outside the court-room. Such conferences would be very difficult to conduct if cameramen were milling around, attempting to take photographs. I would prefer to see some part of the court-house set aside for the use of photographers and television cameramen. If a person were content to be photographed, he or she could be taken to that area. However, the matter is not easy to resolve, since, as Mr. Scott conceded, many of the court-houses in*Ontario*do not have facilities which could be used for that purpose.

In my opinion, the prohibition against taking photographs of persons entering or leaving the court-room is a reasonable limit prescribed by law under s. 1 of the Charter. The prohibition is necessary to preserve the conditions that are essential for a fair and impartial hearing. I would, therefore, dismiss both the appeal and the cross-appeal.

Notes and Questions

1. What arguments are there, apart from those set out in these excerpts, for and against the claim that s. 2(b) includes a constitutional right to film judicial proceedings, over the objection of parties and witnesses (subject to s. 1)?

2. If s. 2(b) were construed to include a right to televise judicial proceedings, what restrictions on cameras in the courtroom would be justifiable under s. 1? Do you agree with the decision of the Provincial Offences Court, or the District Court?

3. Is there a difference from the Charter perspective between allowing T.V. cameras into courtrooms, into royal commission proceedings, and into Parliament or a provincial legislature? Consider whether or not a provincial legislature should be allowed to make rules for the type of media mechanics used to record its proceedings. Chapter 23, infra, examines this aspect of the right to gather news.

4. Advocates for cameras in the courtroom sometimes argue that restrictions on filming in court amount to discrimination against television, as compared to the print medium. What merit

is there to this argument?

5. Opponents to cameras in the courtroom are often critical of the way in which the media would use footage from court. They argue that sensational 30 second clips will be shown on the nightly news, in a fashion which will not be representative of the court process. What relevance, if any, do such arguments have for the Charter analysis in this area?

6. The Law Reform Commission of Canada has recommended in a working paper that an experiment be undertaken with cameras in the courtroom, to ascertain whether or not they have an adverse impact on the conduct of a fair trial. How could this be done? What constraints, if any, would the Charter itself impose on such an experiment?

7. During the trial in R. v. Squires, supra, apart from calling viva voce testimony about the impact of cameras in the courtroom, the accused sought to file with the court a number of studies, conducted by U.S. courts, into the impact of cameras in the courtroom. The Crown objected, on the grounds that these studies had not been properly proven in evidence, were not properly conducted, and were prejudicial to the Crown. If no witness was called regarding these studies, the Crown would have no chance to cross examine on their methodology or reliability. Should the court admit these studies in these circumstances? Why or why not?

8. Is the constitutional position regarding cameras in the courtroom any different from the constitutional position regarding media broadcasting of video tape exhibits, admitted at a trial, such as an accused's video taped confession? Why or why not?

5. PUBLIC ATTENDANCE AT ADMINISTRATIVE TRIBUNAL HEARINGS

Canada has a multitude of administrative tribunals, with authority to dispense justice in important fields such as labour relations, human rights, detention of mentally disordered persons, parol, monopolistic business practices, broadcast regulation etc. These tribunals are at times empowered to deal with the liberty of the person as well as with a large proportion of business regulation. Their proceedings are often quasi-judicial in character. The importance of their deliberations has been enhanced by case law which holds that these tribunals can even be called upon to consider **Charter** questions (See Cuddy Chicks Ltd. v. Ontario (Labour Relations Board (1989), 62 D.L.R. (4th) 125 (Ont. C.A.).

The common law has not traditionally required that administrative tribunals conduct their proceedings in public. (See Re Yuz and Laski (1986), 57 O.R. (2d) 106 (C.A.)) In Ontario, tribunals which are under a legal duty to hold a hearing are generally required to hold proceedings in public pursuant to s. 9 of the **Statutory Powers Procedure Act**, R.S.O. 1980, c. 484 which provides as follows:

Notes and Questions

1. Does **Charter** s. 2(b) guarantee a constitutional right of the public and press to attend proceedings before administrative tribunals? Are there arguments which were not considered in the cases set forth above on either side of this issue?

In Pacific Press Ltd. v. Canada (Minister of Employment and Immigration), [1991] 2 F.C. 327, the court found that the nature of a quasi-judicial hearing before an immigration adjudicator must be open to the public and the press. The section of the Immigration Act which provides for *in camera* hearings violates section 2(b) of the **Charter** and cannot be upheld by section 1. (see also Armadale Communications Ltd. v. Canada, (1991) 83 D.L.R. (4th) 440.)

2. Would your answer to the previous question be the same vis a vis a labour arbitration proceeding, a proceeding before a psychiatric review board (which decides whether a person should be detained medical custody, because he or she is mentally ill and dangerous to themselves or others), to proceedings before the CRTC regarding renewal of a T.V. station's license, and to proceedings before the Discipline Committee of the Ontario College of Physicians and Surgeons involving charges of unprofessional conduct by a doctor?

3. Would your answer be the same for proceedings before the provincial cabinet (which now meets in private) to consider whether to enact a regulation setting the rates for provincial subsidies to nursing homes? What about proceedings before Cabinet to decide on a local ratepayer's petition to have Cabinet overturn a decision of the Ontario Municipal Board, where the Municipal Board had refused to approve a zoning bylaw for the ratepayer's property?

4. If the public and media have a constitutional right to attend administrative tribunal proceedings under Charter s. 2(b), is there also a constitutional right to televise these proceedings?

1. INTRODUCTION

Canadian law is replete with statutory provisions which prohibit the publication of specified information about court proceedings. Some come into operation automatically, and do not require a court order to trigger them. For example, s. 542(2) of the Criminal Code bans pre-trial reporting of a confession or admission tendered into evidence at a preliminary hearing. Others come into effect only if a court makes a non-publication order. For example, s. 539 of the Criminal Code provides that where an accused so requests, a judge must order the media not to report any of the evidence tendered at a preliminary hearing until conclusion of the case. Some of these non-publication provisions are only temporary, while others operate in perpetuity. For example, ss. 486(3)-(5) of the Criminal Code bans for all time the reporting of a sexual assault complainant's identity, if the complainant requests such. In contrast, s. 539, supra, only bans reporting of preliminary hearing evidence until the end of the case.

In addition to these statutory provisions, the common law crime of contempt of court, preserved under the Criminal Code, includes offences of contempt in the face of the court (such as refusing to testify), and contempt out of the face of the court. This latter offence includes, among other things, the offence of sub judice contempt. Sub judice contempt involves the publication of information which has the reasonable tendency to interfere or prejudice the administration of justice. Pre-trial reports of the accused's criminal record, or of inculpatory information will tend to constitute a contempt. It appears that one exception to this rule provides that accurate reporting or publication of information disclosed in open court at a pre-trial proceeding, such as a preliminary inquiry, is per se not a contempt even if the information is highly prejudicial to the accused, although the vagueness of the defence's definition makes its reach difficult to ascertain. (See M.D. Lepofsky; Open Justice: The Constitutional Right to attend and Speak About Criminal Proceedings; (Toronto: Butterworths, 1985))

As well, a number of judges, and particularly those in courts of superior or general jurisdiction, have claimed to have inherent power to ban publication of reports about proceedings before them, even in the absence of any statutory mandate to issue such press restrictions. Some claim this to be part of the court's inherent power to control its own processes.

What is the scope of permissible limitations on reporting or public statements about court proceedings?

them. In these cases, a ban may be justified, provided that it goes no further than required to avoid the demonstrated risk of an unfair trial.

¶ 226 The common law test for whether a ban should be ordered is that there is a real and substantial risk that a fair trial would be impossible if publication were not restrained. Properly applied, that test meets the requirements of justification of an infringing measure under s. 1 -- that the infringement be rationally connected to the goal, that it be minimally intrusive, and that it be proportionate to the benefit achieved. What is required is that the risk of an unfair trial be evaluated after taking full account of the general importance of the free dissemination of ideas and after considering measures which might offset or avoid the feared prejudice. What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered. The courts are the guardians not only of the right to a fair trial but of freedom of expression. Both must be given the most serious consideration.

¶ 227 Rational connection between a broadcast ban and the requirements of a fair and impartial trial require demonstration of the following. First, it would seem necessary to show that many people eligible to sit as jurors would see the broadcast; conversely, if a substantial number would not see it, there should be no problem selecting a jury from among them. Second, it must be shown that publication might confuse or predispose potential jurors. In the case of a fictional work, it should be shown that jurors will not be able to separate broadcast fiction from reality. Third, it must be shown that any confusion may not be dispelled by proper direction or by other measures, such as judicial directions, change of the venue of the trial, or more exacting jury selection processes. If after considering all such matters, the judge is still left with a real concern that there is a substantial risk the trial may be rendered unfair, a rational connection between the infringement of freedom of expression and the ban will have been established.

¶ 228 Once the rational connection has been established, the judge must go on to ensure that the ban is minimally intrusive, i.e., that it impinges on freedom of expression no further than is actually required to avoid the risk of an unfair trial. It must be confined to the minimum geographical area required. It must not extend to more forms of expression or media of dissemination than necessary. And it must cease at the earliest possible time consistent with removing the risk of an unfair trial.

¶ 229 In the case at bar, the judge ordering the ban failed to direct herself sufficiently to the sort of considerations which go to establishing rational connection and minimal impairment. It follows that the ban cannot be supported.

4. Disposition

¶ 230 I would allow the appeal and set aside the ban.

Notes and Questions

1. Would it be constitutional for Parliament to pass a provision which bans publication of the identity of any person or corporation which is charged with an offence under the Criminal Code, or information which would identify that person, unless, either:

(a) the accused consents to the publication, or
(b) the accused has been convicted of an offence, and all appeals have been exhausted.

2. Would your answer to the previous question be different if the law did not ban reporting of an accused person's identity, but instead, provided that where a media outlet reports that a person has been charged with an offence, and identifies that person, it must also report the outcome of their trial, with equal prominence in the newspaper or broadcast.

3. To what extent may Parliament ban publication of the fact that a person was the target of a police search? Section 487.2 of the Criminal Code provides as follows:

> 487.2 (1) Where a search warrant is issued under section 487 or 487.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to
>
> (a) the location of the place search or to be searched, or
> (b) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,
>
> without the consent of every person referred to in paragraph (b) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.

3. LOWER CANADIAN COURTS

Re Global Communications Ltd. and Canada (A.-G.) (1984), 5 D.L.R. (4th) 634 (Ont. C.A.)

[His Honour Judge Ferguson, following a motion made by counsel for the Attorney-General of Canada as agent for the State of California at the bail hearing of Cathy Evelyn Smith, pending the hearing of the case for her extradition to stand trial in California on the charge of having murdered John Belushi, ordered "that all evidence given, and all representations made by both counsel at the bail hearing ... shall not be published in any newspaper (as defined in s. 261 of the Criminal Code) or broadcast anywhere, before such time as the fugitive in respect of whom these proceedings are held is ... discharged, or if committed for extradition ... as her trial in the State of

Notes and Questions

1. These cases were decided before the Supreme Court of Canada's rulings in the Edmonton Journal and Canadian Newspapers cases, supra. Does their reasoning comport with the Supreme Court's approach to the constitutionality of publication bans regarding court proceedings?

2. An alternative which neither of these courts considered was the implementation of additional measures to ensure that the jury would not be influenced by prejudicial media publicity. For example, jury selection could be conducted with additional care. The parties could be given additional peremptory challenges during jury selection, over and above those allocated under the criminal Code. The jury, once selected, could be sequestered. Are these constitutionally preferred alternatives to suppression of media reports about a case?

3. The restrictions on media reporting in these cases were temporary i.e. until the end of the case. Does this mitigate from their impact on freedom of the press? What about the media's concern to report the news while it is still current, and hence, newsworthy?

4. In the famous American Watergate and Iran-Contra trials, well-known government officials were placed on trial after congressional hearings had received masses of incriminatory testimony about them, on national television. Is it possible to ensure the selection of a fair and impartial jury in such circumstances?

5. In **R. v. D.(G.), (1991) 2 O.R. (3d) 498 (C.A.)** the Ontario Court of Appeal overturned the trial judge (see R. v. D.(G.), (1988) 39 C.C.C. (3d) 369 (Ont. H.C.J.), who ordered the media not to report the identity of a church minister who was charged with a sexual offence alleged to be committed against a parishioner. The Criminal Code only authorized bans on reporting the name of the sexual assault complainant, and hence, there was no statutory authority for this order. It had been purportedly issued pursuant to the court's inherent power over its procedure. When the media challenged the validity of this order before the Ontario Supreme Court, the court held that there was no inherent power to make this order, that this order violated s. 2(b), and that it was not saved under **Charter** s. 1, because the public has a strong interest in knowing the identity of persons charged with crimes. However, the Supreme Court then exercised its discretion over the grant of remedies, and chose not to quash the non-publication order. It noted that the accused had been acquitted in the meantime, had lost his job, and had suffered a great deal as a result of being charged. The Court of Appeal however found that if section 7 of the Charter protects a privacy interest, there is not an absolute right to privacy, but only a right not to be deprived of privacy except in accordence with the principles of fundamental justice. The Court of Appeal held that the right to a public trial is not a right of the accused's alone which he can chose to waive; the public has as much interest in the conduct of the trial as has the accused.

6. The Crown wishes to call as witnesses in a prosecution several prison inmates, to testify about inculpatory admissions which the accused made while detained in prison (presumably by bragging). Because the witnesses fear that their lives may be in jeopardy if their fellow inmates

1. INTRODUCTION

Traditionally in Canada, public criticism of courts, and of judicial decisions has been muted and temperate. At the close of a case, when a decision is rendered, if parties give media interviews at all, it is not unusual for the winning party to exclaim their delight with the decision, while the losing party hesitantly says that they are not pleased with the outcome, and will file and appeal. This restraint is most absent in the setting of law schools, where court decisions are exposed to intense criticism on an hourly basis.

This situation is traceable to the existence in law of rather severe restrictions on the criticism of courts. It is a situation which one might readily call into question at the current point in Canadian history. Courts are now called upon to address questions of important public policy in intensely controversial areas, to an unprecedented degree, in light of the **Charter**'s enactment. Moreover, Canadians are increasingly attentive to the conduct of courts, and the attitudes of the judiciary, in light of heightened concern about gender bias in the judiciary, judicial attitudes towards racial minorities such as Canada's first nations, and the like.

The question therefore presented in this chapter is: to what extent does the **Charter**'s free expression guarantee constitutionally protect criticism of courts, judges, and judicial decisions?

2. CONTEMPT OF COURT BY SCANDALIZING THE COURT

Traditionally, criticism of courts has been subject to severe legal restriction. Criminal Code s. 298 creates the offence of defamatory libel, while s. 307(1) creates an exception for fair reports on public proceedings before a court and s. 310 creates an exception for fair comment on the public conduct of "a person who takes part in public affairs". However, the most pronounced restriction on criticism of courts is the common law offence of contempt of court. The contempt doctrine includes the offence of scandalizing the courts. By this offence, it is an offence to say anything which creates a tendency to or which lowers the authority, standing, and reputation of the court in the community (See Lepofsky; Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworths, 1985).)

The traditional rationales for the scandalization offence are that unfair criticism of courts will lessen public confidence in the judiciary, and hence, render the courts less effective at dispensing justice. Moreover, judges are unable to defend themselves from criticism, because of traditional restrictions on public comment by judges on cases in which they have been involved.

To what extent can the law be employed to punish a person for criticism of courts,

the truth.

[Justices Black and Douglas wrote a separate judgment concurring in the result.]

Notes and Questions

1. What is left of the contempt scandalization offence after Kopyto? What must the Crown prove to convict a person of this offence? What kinds of evidence would be required to meet this burden?

2. Are restrictions on criticism of courts more readily justified when they are applied to lawyers than when they are applied to parties to a court case, or to other members of the public? Are lawyers in any different position vis a vis the criticism of courts?

3. Rule XI, Commentary 5 of the **Code of Professional Conduct** of the Law Society of Upper Canada provides as follows:

> 5. Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. Firstly, the lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Secondly, if the lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Thirdly, where a tribunal is the object of unjust criticism, the lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because the lawyer is thereby contributing to greater public understanding of and therefore respect for the legal system.

Is this rule constitutional? Are professional discipline proceedings against a lawyer for criticism of courts different from the **Charter**'s perspective than a criminal prosecution for contempt of court?

4. See **Re Klein and Law Society of Upper Canada**, (1985) 50 O.R. (2d) 118 (H.C.J.) where the court struck down a rule in the Code of Professional Conduct for lawyers in Ontario regarding their delaings with the media.

Rule 21 of the **Code of Professional Conduct** of the Law Society of Upper Canada provides as follows:

Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.

The lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.
The lawyer owes a duty to the client to be qualified to represent the client effectively before the public and not to permit any personal interest or other cause to conflict with the client's interests.

The lawyer should, when acting as an advocate, refrain from expressing the lawyer's personal opinions as to the merits of a client's case.

The lawyer should, where possible, encourage public respect for and try to improve the administration of justice. In particular, the lawyer should treat fellow practitioners, the courts, and tribunals with respect, integrity and courtesy. Lawyers are subject to a separate and higher standard of conduct than that which might incur the sanction of the court.

Public communications should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.

5. Assume that a provincial Attorney General, disgruntled about a court decision, tells a reporter that the decision is "outrageous", that the court's decision revealed the judge's bias, and that he intends to file an appeal. Does the **Charter** protect him?

6. As indicated above, one of the reasons advanced at times to justify restrictions on criticism of judges is that judges cannot defend themselves by responding to the criticism. There is something of a convention in Canada that judges should not speak out about political subjects, or about matters which may come before them in their judicial capacity. As part of this tradition, various jurisdictions even deny judges the right to vote. Is this tradition of restricting the public comment of judges itself justified? What arguments are there for and against allowing judges to defend themselves in the public arena, so long as they do not specifically comment on a case which is pending before them, and is not yet completed?

it would from a similar picket on the sidewalks across the street.

We thus perceive insufficient justification for [the statute]'s prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the building. We hold that under the First Amendment the section is unconstitutional as applied to those sidewalks.

[Justices Marshall and Stevens wrote separate judgments concurring in part and dissenting in part.]

Notes and Questions

1. In **R.W.D.S.U. v. Dolphin Delivery**, [1986] 2 S.C.R. 537, the Supreme Court of Canada held that picketing can constitute an exercise of freedom of expression. However, it refused to quash a lower court's injunction, which prohibited a labour union's picketing. It held that the **Charter** does not apply to a court order, issued on the application of one private party against another private party, when it is based on non-statutory private law, such as the common law. The court held in material part as follows (per McIntyre J.):

> I am in agreement with the view that the Charter does not apply to private litigation. ... In my view, s. 32 of the Charter, specifically dealing with the question of Charter application, is conclusive on this issue. ... Section 32(1) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. ...the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.
>
> The element of governmental intervention necessary to make the Charter applicable in an otherwise private action is difficult to define. We have concluded that the Charter applies to the common law but not between private parties. The problem here is that this is an action between private parties in which the appellant resists the common law claim of the respondent on the basis of a Charter infringement. ... The respondent has sued and has procured the injunction which has enjoined the picketing on the basis of the commission of these torts. The appellants say the injunction infringes their Charter right of freedom of expression under s. 2(b). ... While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would,

it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

An example of such a direct and close connection is to be found in Re Blainey and Ontario Hockey Association, supra. In that case, proceedings were brought against the hockey association in the Supreme Court of Ontario on behalf of a twelve year old girl who had been refused permission to play hockey as a member of a boys' team competing under the auspices of the Association. A complaint against the exclusion of the girl on the basis of her sex alone had been made under the provisions of the Human Rights Code, 1981, S.O. 1981, c. 53, to the Ontario Human Rights Commission. It was argued that the hockey association provided a service ordinarily available to members of the public without discrimination because of sex, and therefore that the discrimination against the girl contravened this legislation. The Commission considered that it could not act in the matter because of the provisions of s. 19(2) of the Human Rights Code, which are set out hereunder:

> 19.--(1) ...
>
> (2) The right under section 1 to equal treatment with respect to services and facilities is not infringed where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex.

... In the Blainey case, a law suit between private parties, the Charter was applied because one of the parties acted on the authority of a statute, i.e., s. 19(2) of the Ontario Human Rights Code, which infringed the Charter rights of another. Blainey then affords an illustration of the manner in which Charter rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation -- government action -- against the Charter. ... Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. ...

Can it be said in the case at bar that the required element of government intervention or intrusion may be found? In Blainey, s. 19(2) of the Ontario Human Rights Code, an Act of a legislature, was the factor which removed the case from the private sphere. If in our case one could point to a statutory provision specifically outlawing secondary picketing of the nature contemplated by the appellants, the case -- assuming for the moment an infringement of the Charter -- would be on all fours with Blainey and,

> subject to s. 1 of the Charter, the statutory provision could be struck down. In neither case, would it be, as Professor Hogg would have it, the order of a court which would remove the case from the private sphere. It would be the result of one party's reliance on a statutory provision violative of the Charter.
>
> In the case at bar however we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While, as we have found, the Charter applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the Charter. It follows then that the appeal must fail. (at 597-604)

Can the decisions in Dolphin Delivery and B.C. Government Employees Union be squared with each other?

2. Are there good reasons for treating demonstrations in front of a courthouse any differently for **Charter** purposes than demonstrations in front of a provincial legislature, assuming that in both cases, the demonstrators do not block access to the building?

3. Would your answer to Question 2 be any different if the object of the demonstration is the conduct of a jury trial within the courthouse that is ongoing? What if the trial is completed, and the jury has rendered its verdict?